

UNITED STATES GOVERNMENT

# Memorandum

TO : DIRECTOR, FBI (15-38700)

DATE: 3/12/65

SAC, WFO (15-4370)(P)

SUBJECT: GERALD COVELLI; ET AL  
TFIS - CONSPIRACY.  
OOJ; BRIBERY;  
MISPRISION OF FELONY

ReCGairtel to Director dated 2/26/65.

Enclosed for the information of the Bureau is one copy each of Petitions for Writ of Certiorari in the following three cases:

JAMES ALLEGRETTI vs. The United States, case number 924, Appellate;

LOUIS DARLAK vs. The United States, case number 925, Appellate;

DAVID FALZONE vs. The United States, case number 926, Appellate.

It is noted from the Petitions that ALLEGRETTI, DARLAK, and FALZONE, ET AL were convicted in the U. S. District Court for the Southern District of Illinois, Northern Division, of conspiracy to unlawfully possess certain whiskey, taken from an interstate shipment and possession of the same goods.

It is noted also that the U. S. Court of Appeals for the Seventh Circuit, 4/22/64, reversed and remanded this case for a new trial. The same Court of Appeals, sitting en banc, on 12/22/64, affirmed judgment of the District Court.

- 2 - Bureau (Enc. 3)  
1 - Chicago (15-12848) (Info)  
1 - WFO

RCV:dmw  
(4)

ENCLOSURE ATTACHED  
ENCLOSURE

REC 37

15-38700-268

8 MAR 15 1965

EX - 109



10 MAR 18 1965

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

MAR 16 3 55 PM '65

F. B. I.  
U. S. DEPT. OF JUSTICE

WFO 15-4370

*PRINTED*

Printed decisions of the Court of Appeals are affixed to the Petitions. ~~in case~~. It is noted that the Petitions contain references to the FBI and FBI Agents investigating this case.

WFO will continue to follow and report decisions of the Supreme Court in these cases.

89C

15-38700-21



ENCLOSURES TO BUREAU (3)

Bufile 15-38700  
WFOfile 15-4370

By letter dated 3/12/65

Office-Supreme Court, U.S.

FILED

FEB 20 1965

JOHN F. DAVIS, CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1964.

No. 926

DAVID FALZONE,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT.

DANIEL C. AHERN,

10 South LaSalle Street,

Chicago 3, Illinois,

*Attorney for David Falzone.*

## UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois.

Thursday, January 21, 1965

Before

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Latham Castle, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

Nos. 13915, 13916, 13917, 13918

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

vs.

JAMES ALLEGRETTI, DAVID FALZONE,  
FRANK LISCIANDRELLO, LOUIS  
DARLAK,

Defendants-Appellants.

Appeals from the  
United States Dis-  
trict Court for the  
Southern District  
of Illinois, North-  
ern Division.

IT IS HEREBY ORDERED by the Court sitting *en banc* that the petitions for rehearing filed in the above-captioned appeals be, and the same are hereby DENIED.

(Judge Schnackenberg voted to grant petitions for rehearing.)

SCHNACKENBERG, *Circuit Judge*, partly concurring and partly dissenting.

I approve and concur in Judge Knoeh's opinion insofar as it is not inconsistent with the majority opinion of this court filed on April 22, 1964.

The comment of a judge who concurred is pertinent:

“\* \* \* And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the 'feeling of collective culpability for a finding of individual guilt.' ”

I would reverse the district court in this case and remand it for a new trial.

the jury according possible collaboration between Lou Fushanis, one of his employees, and Gerald Covelli, sought to be introduced by way of cross-examination. Our study of the matter leads us to the opposite view that the Trial Judge did not abuse his authority in this respect. One of the explanations given for the effort to introduce the evidence sought to be elicited by way of cross-examination is that the defense could hardly be expected to call Gerald Covelli as its witness. The difficulties inherent in trial tactics cannot be permitted to dilute the authority of a Trial Judge to control the trial. We find no error here.

Contrary to defendant's contention, the Trial Judge did instruct the jury that to find defendants guilty they must find them to have known that the merchandise involved was stolen from interstate commerce. It was not necessary to give repetitious instructions tendered by the defense.

The Trial Court also instructed the jury regarding the definition of an accomplice and the caution to be exercised in weighing his evidence. Whether Lou Fushanis was or was not an accomplice or co-conspirator was an issue of fact which was presented to the jury by a conflict in the evidence. It was not error for the District Judge to refuse to underline the testimony of one of the witnesses and his inferences respecting this issue. If the jury concluded Lou Fushanis was an accomplice, then they had been told how to treat his testimony, and they had adequate instructions in interpreting that testimony with respect to the basic issues of the innocence or guilt of the defendants.

We have reviewed all other points raised by the defendants. After due consideration, we find that none operates to alter our conviction that the judgment of the District Court must be affirmed.

**AFFIRMED.**

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diamonds and that he was studying Spanish for that purpose. We do not consider this, or the other similar actions by the Trial Judge, as bases for reversal.

It is further contended that the defendants were denied their rights under 18 U. S. C. § 3500 (Jencks Act) with respect to the witness Max Olshon. It is apparent from our own close study in camera of the documents in question, which included both direct statements of witnesses and reports of government agents, which the Trial Judge examined in camera, that he did not, as feared by defense counsel, limit the word "statements" as used in the statute to mean only such statements as the witness had himself set down on paper. We find no error in this regard. Max Olshon testified to a conversation with David Falcone on March 18, 1959. The prior statement of Max Olshon which was produced did not refer to this conversation. Objection was sustained to the question whether he had told the Grand Jury about it. The Trial Court denied a motion for production of the Grand Jury transcript of his testimony to ascertain whether he had or had not mentioned this conversation. No such particularized need was shown for such production as to outweigh the traditional maintenance of secrecy surrounding grand jury proceedings. It was not error to deny the motion. *U. S. v. Magin*, 7 Cir. 1960, 280 F. 2d 74, 79; *U. S. v. Nasser*, 7 Cir., 1962, 301 F. 2d 243, 245, and cases there cited.

We have given particularly close consideration to the assertion that cross-examination of government witnesses was unduly limited to the prejudice of the defendants. In every such instance cited by the defendants, the Trial Judge sustained objections to the questions as beyond the scope of the direct examination. The defendants concede the traditionally wide latitude given to a Trial Judge in controlling cross-examination, but argue that the principle has here been expanded to keep relevant facts from

It is contended that this admonition was insufficient and that a motion for mistrial should have been allowed. Although adjudged restored to sanity, the witness's interest, possible prejudices and accuracy of memory, and factors affecting these, were all proper subjects of cross-examination. The government was entitled to elicit pertinent circumstances affecting his credibility. *U. S. v. Lawinski*, 7 Cir., 1952, 195 F. 2d 1, 7. As the government argues, Mr. Westerhausen's mental history was extremely complex, *U. S. v. Westerhausen*, 7 Cir., 1960, 283 F. 2d 844, 848, including not only loss of memory, but auditory hallucinations. After carefully weighing the matter, we do not agree that this one question, which the Trial Judge held to be improper, and on which the jury were promptly instructed, required a mistrial. Similarly, we find no reversible error in the failure of the prosecution to follow up with affirmative proof its questions to which Mr. Westerhausen gave negative answers.

In several instances, the Trial Judge ordered parts of the testimony stricken although the defendants had moved not to strike but to declare a mistrial. A typical instance was Gerald Covelli's statement that there was a price on his head. The Trial Judge ordered the statement stricken and instructed the jury to disregard it. Gerald Covelli had been asked on cross-examination about having studied Spanish and Italian in Leavenworth and had denied that he proposed to go to Rio de Janeiro to take "off a diamond score." It was proper on redirect to cover the same subject matter. On redirect, Covelli said he was studying those languages because he proposed ultimately to leave the country and live elsewhere. He then added, not responsively, "I could never live peacefully in this country, because there is a price on my head now." Later Robert Westerhausen testified that Gerald Covelli had admitted to him that he intended to go to Brazil to steal

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1964.

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

DAVID FALZONE,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT.**

*To The Honorable, The Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

The petitioner, David Falzone, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

**JUDGMENT AND OPINIONS OF THE COURT BELOW.**

The judgment of the United States District Court for the Southern District of Illinois, Northern Division, was entered on June 26, 1962. It is not reported but appears in the certified, printed, joint appendix filed herewith.

The original opinion of the United States Court of Appeals for the Seventh Circuit, filed April 22, 1964, was not published and is set forth in the appendix to this petition.

The contrary opinion of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, on a rehearing filed December 22, 1964, was not published and is set forth in the appendix to this petition.

### JURISDICTION.

The order of the United States Court of Appeals, affirming the judgment and sentence of the United States District Court for the Southern District of Illinois, Northern Division, was filed December 22, 1964. The petition for rehearing was denied on January 21, 1965. This petition is seasonably filed under Rule 22 of this court.

Jurisdiction in this court to review the judgment below is provided in 28 U. S. C. 1254 (1).

### QUESTIONS PRESENTED.

1. Was it not a denial of the petitioner's right to trial by jury for the trial judge to instruct the jury at the close of the Government's evidence in chief that the Government had shown to the satisfaction of the court that a connection existed between numerous acts and declarations of co-defendants and this petitioner, and, hence, were admissible against him even though he was absent during these actions and declarations.

2. Did not the Government resort to an aggregate of misconduct contrary to the minimal standards of fair play in asking of an important defense witness the irrelevant but destructive question of whether he recalled killing his stepmother; and in eliciting from its principal accomplice

U. S. Attorney's office. During cross-examination of Gerald Covelli reference was made to contradictions between his prior statements and his trial testimony. Gerald Covelli was explaining this on re-direct, pointing out that he had been corrected by David Falzone as to certain dates and places in the course of the above conversation. The corrections and attendant comments made by David Falzone, and described by Gerald Covelli, were inculpatory admissions of David Falzone and were clearly admitted only as evidence against Falzone. These admissions were corroborated by the testimony of a government agent present at the time who was properly permitted to testify to that effect and to the attendant circumstances, including the questions and comments in answer to which the inculpatory admissions were made.

The testimony of Gerald Covelli was a vital part of the government's case. The defense witness Robert Westerhausen testified that while he and Covelli were prisoners at Leavenworth, Covelli told him in the course of many conversations that he was being paid to implicate his co-defendants, who in fact had nothing to do with the stolen liquor, in order to shield the real culprits.

The cross-examination of Mr. Westerhausen brought out the details of his prior long history of mental incapacity, although he had since been judicially determined as restored to sanity. On redirect, Mr. Westerhausen testified to the nature and extent of his prior mental disease and its cure beginning in 1955 with the result, he stated, that his memory began to improve. On re-cross, Mr. Westerhausen said again that his memory had begun to improve about 1955. The government counsel then asked whether Mr. Westerhausen now recalled killing his stepmother. The Trial Judge sustained objections to this and instructed the jury:

"The jury is instructed and admonished by the Court to pay no attention whatever to the last improper question by the Government."

Covelli testified that he and David Falzone then engaged in efforts to raise the money requested by James Allegetti for that purpose. There was evidence that David Falzone continued to participate in the conspiracy. *U. S. v. Agueci*, 2 Cir., 1962, 310 F. 2d 817, 839, and cases there cited. It was not necessary for the government to prove what, if anything, James Allegetti actually did to "straighten out the case," and continue the conspiracy. There was evidence that he asked for money and that, after David Falzone's arrest and release on bond, Falzone and Gerald Covelli did raise such sums which were turned over to James Allegetti to be used for that purpose.

David Falzone testified that he had seen Agent Weatherwax casually at a motel in April, 1962, had started a conversation with him, and that Agent Weatherwax, on hearing that Falzone proposed to testify at the trial, had said, "Don't be a fool, we will murder you on that stand." On cross-examination, the government attempted in vain to elicit certain testimony of further conversation with Agent Weatherwax respecting David Falzone's reasons for testifying as he did. Under the circumstances, it was proper rebuttal for Agent Weatherwax to testify to those further conversations and to incriminating admissions made by David Falzone in the course of such conversations.

We have scrutinized all the other examples of such evidence, the admission of which is characterized by appellants as reversible error, and must conclude that the position of the defense on this point is not well founded.

It is contended that post conspiracy declarations of one co-defendant, although admitted as to him alone (a matter on which the jury was instructed) were elicited with intent to prejudice the other defendants. Some of these declarations were made in the course of conversation between David Falzone, Gerald Covelli, and various government agents, including William D. Weatherwax, in the

witness that he was leaving the country after the trial because he had a price on his head; and in the efforts of one of the assistant district attorneys and an agent of the Federal Bureau of Investigation to frighten this petitioner from testifying in his own behalf?

#### CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States:

Article III, Section 2:

"... The Trial of all Crimes, except in Cases of Impeachment shall be by Jury;"

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall be been committed. . . ."

#### STATUTES INVOLVED.

Title 18 U. S. C. Section 371. Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 U. S. C. Section 659. Interstate or Foreign Baggage, express or freight.

"... Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both. . . .”

on some of the cafés involved, or making false exculpatory statements to the government agents.

There were sharp conflicts in the testimony and in numerous instances the jury would have to resolve issues of credibility. Viewed in the light most favorable to the government, the evidence supports the convictions. *Glasser v. U. S.*, 1942 315 U. S. 60, 80.

We do not adopt the majority opinion of April 22, 1964, with respect to the comments made by the Trial Judge in connection with his ruling on the admissibility of acts and statements of certain defendants in evidence against other defendants. It was on the basis of those comments that the majority, in the opinion of April 22, 1964, based its reversal of the convictions here appealed. We adopt instead the dissenting opinion to the effect that the statements of the Trial Judge did not constitute reversible error. . . . F. 2d . . . , beginning at page . . . .

The defendants contend that statements made by alleged co-conspirator defendant David Falzone after his arrest were improperly admitted in evidence against other defendants. Their theory is that with the arrest of David Falzone, and the raids made the same day on some of the cafés where the stolen whiskey was stored, the conspiracy to possess liquor stolen from interstate commerce had come to rest. The evidence in the record supports a contrary holding that David Falzone's arrest did not terminate the conspiracy. Gerald Covelli testified to seeing some of the stolen whiskey in the possession of fellow conspirators two weeks after the earlier raids on some of the cafés. Even while in the custody of the Federal Bureau of Investigation, David Falzone was still issuing instructions for disposition of a part of the stolen liquor. Max Olshon testified that when released on bond, David Falzone stated that he was not unduly worried because Jimmy Allegetti would “straighten out the whole case.” Gerald

nature of these proceedings is sufficiently set out to make repetition here unnecessary.

We have enjoyed the benefit of oral argument on such re-consideration together with the record and the briefs of counsel.

On reconsideration, this Court adopts the majority opinion handed down April 22, 1964, insofar as that opinion concluded that the evidence was sufficient to convict all the defendants herein on both counts of the indictment of (1) conspiracy to possess whiskey stolen from interstate commerce knowing such whiskey was stolen from interstate commerce, and (2) as to each defendant, of knowingly possessing the stolen whiskey.\*

The trial was a long one. The conspiracy disclosed by the evidence was complicated. There was ample proof that the whiskey in question was stolen from an interstate shipment and abundant circumstantial evidence from which the jury could have concluded that each defendant must have known that the whiskey was stolen. The record shows that all of the defendants contributed to carrying out the object of the common conspiracy to possess the stolen whiskey. We deem it unnecessary to narrate the details of their activities. The record discloses that each engaged in one or more of such acts as storing the whiskey, directing or carrying out its distribution to various cafes, operating those cafes, stowing the whiskey there, and, in some cases, transferring it to other containers, raising funds to enable the conspiracy to continue after government agents had arrested one of the conspirators and after raids

\* In the opinion of April 22, 1964, .... F. 2d ...., at page...., the Court stated: "In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendants' contention to the contrary."

# STATEMENT OF THE CASE.

The petitioner, David Falzone, was indicted, together with James Allegritti, Louis Darlak, Frank Lisciandrello and Joseph Lisciandrello, on June 30, 1960, under two counts, one, charging a conspiracy, contrary to Title 18, Section 371, United States Code, to possess whisky, valued in excess of \$100.00, which had been stolen from an interstate shipment; and, two for possession of this whisky, contrary to Title 18, Section 659, United States Code.

All defendants (excepting Joseph Lisciandrello who was severed because of illness during the trial) were found guilty by a jury of both counts and on June 26, 1962, each was sentenced to serve five years imprisonment under the conspiracy charge and seven years imprisonment, to be concurrently served, under the possession charge. A three thousand dollars fine was also imposed on each of the defendants.

On April 22, 1964, the majority of a three judge division of the Court of Appeals reversed the judgment and sentence of the trial court and remanded the case for a new trial.

On December 22, 1964, six of the seven judges sitting *en banc* on a rehearing rejected the earlier majority opinion and adopted the minority opinion, affirming the judgment and sentences below.

On January 21, 1965, six of the seven judges sitting *en banc* denied the petitions for rehearing.

## STATEMENT OF FACTS.

During the course of the trial of this case the Government presented 20 witnesses in chief who testified to many acts, declarations, and statements by one or more of the alleged coconspirators, including those of the Government's principal witness, Gerald Covelli, a self styled accomplice, to which this petitioner and all nonparticipating defendants objected. On each such occasion, the court reserved its ruling on the avowal of the prosecution to connect up this testimony.

At the close of the Government's evidence, the prosecution moved to admit all of the testimony as to these acts and declarations against all of the defendants.

Whereupon the court instructed the jury thusly:

"Ladies and gentlemen, will you please give me your attention:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

"I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.

"At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

SEPTEMBER TERM, 1964 — SEPTEMBER SESSION, 1964

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
No. 13915 vs.

JAMES ALLEGRETTI,  
Defendant-Appellant.

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
No. 13916 vs.

DAVID FALZONE,  
Defendant-Appellant.

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
No. 13917 vs.

FRANK LISCIANDRELLO,  
Defendant-Appellant.

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
No. 13918 vs.

LOUIS DARLAK,  
Defendant-Appellant.

Appeals from the  
United States District  
Court for the  
Southern District  
of Illinois, Northern  
Division.

December 22, 1964

Before HASTINGS, *Chief Judge*, and DUFFY, SCHNACKENBERG, KNOCH, CASTLE, KILEY and SWYGERT, *Circuit Judges*, en banc.

KNOCH, *Circuit Judge*. This matter came before the Court for reconsideration of its opinion previously rendered on April 22, 1964, \_\_\_\_\_ F. 2d \_\_\_\_\_, in which the

was unable to perform his duty. Without making such a presumption, I can find no support for the decision which the majority of this court has reached. I have a strong respect for the fundamental right of *every* accused person to a *fair* trial. I have an equally strong respect for the requirement of an orderly judicial process at both the trial court and appellate level. It is my opinion that we will further neither of those causes if these judgments are reversed. Fair trial must, of necessity, not mean "perfect" trial. It must successfully protect the rights of each individual accused, and, at the same time, protect society in general. Only thus will it preserve that high respect for law and order (which is sadly lacking in many areas of our national existence today) without which our form of life and government would soon perish.

In the absence of a single iota of proof to the contrary, I confidently believe this jury conscientiously performed the duty which they were empanelled and sworn to perform. Upon this record, each of the defendants has had a fair trial. The evidence of record fully supports the jury's verdict upon each count of the indictment and against each of the defendants. I cannot agree we should sift the record with a fine sieve to find a slight imperfection which could not have enured to the prejudice of any of the defendants for reversal of these judgments.

I would affirm the judgment upon each of these appeals.

when such acts were done, such conversations were had or such statements were made.

"I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

"Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time."

The motions of all defendants for a mistrial on the ground that the court had invaded the province of the jury were denied (App. 296-298).

On the direct examination of Gerald Covelli the Government elicited from the witness that after the trial he was leaving the country because there was a price on his head. Whereupon the motions of all defendants for a mistrial were denied (App. 242-243).

During the Government's cross examination of Robert Westerhausen, the prosecution asked whether he recalled killing his step-mother. The motions of all defendants for a mistrial were denied (App. 356-357).

In the midst of the trial, one of the Assistant United States Attorneys conducting the trial and an agent of the Federal Bureau of Investigation called upon this petitioner at the motel where he was staying and told him he was a fool to take the stand in his defense and, if he did, they would murder him (App. 324-325, 339-340).

### ARGUMENT.

The Court should grant the writ of certiorari in this case for two reasons:

First, the opinion below has decided an important question of federal law which has not been, but should be, settled by this court.

Second, the opinion below disregards the duty to supervise the administration of criminal justice in the federal courts.

#### 1.

Where, as in this case, the Government indicts several persons as both coconspirators, under count one, and as members of a joint enterprise to possess property stolen from an interstate shipment, under the second count, it is a basic right of each defendant to have his case decided individually by the jury. *Constitution of the United States*, Article III, Section 2; Amendment VI.

Moreover, it is the jury's province to determine whether each defendant has been shown by credible evidence of his own conduct, only, to have been a member of the alleged conspiracy or a member of the joint enterprise before hearsay actions and utterances of his codefendants may be considered as evidence bearing on his guilt. *Carbo v. United States*, 9 Cir., 314 F. 2d 718, 735-737; *United States v. Dennis*, 2 Cir., 183 F. 2d 201, 230-231.

Yet, the trial judge, in this matter, at the close of the Government's case in Chief (App. 296-297), instructed the jury as a matter of law that sufficient independent, credible evidence of the membership of all the defendants in the conspiracy and joint enterprise had been shown.

The majority opinion of April 22, 1964, following its

Finally, the jury was charged as follows:

"It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined upon the evidence which has been admitted against him.

"As you have noted, a separate crime or offense is charged against each of the defendants in each count of the indictment. Each offense and the evidence applicable thereto should be considered separately. The fact that you find some or all of the accused guilty or not guilty of the offenses charged should not control your verdict with respect to any other offense charged."

The charge given was complete and adequate. Upon this record, the jury can have ignored the conspiracy evidence and, yet have found beyond all reasonable doubt that the whiskey was stolen from an interstate shipment of freight, that each of the defendants had possession of all, or some, of the whiskey and that each of them knew that the whiskey had been stolen. I agree with the majority of the court that the evidence of record is sufficient to prove every essential element of the offense and the guilt of each of the defendants.

The jury system assumes that the persons selected after proper voir dire to serve as jurors are equipped with a sufficient degree of intelligence and literacy to understand and comprehend the English language. The system also presumes that jurors can take the law as given to them by the courts, apply the law to the evidence before them, and through that process, render their verdict. I am not willing to presume that any member of this jury was so lacking in intelligence and understanding that he or she

By contrast, the comment here involved was made at the close of the government's case, with several days of trial, as summarized in almost 140 printed pages of narrative in the appendix, intervening between the comment itself and the final charge of the jury. The error, if any, was harmless, when viewed in its context in this record.

The majority opinion and decision reversing these judgments as to the substantive count of the indictment, count 2, is even more devoid of logic than is the majority opinion relative to count 1. The only reason assigned for reversal as to count 2 is that the difficulty of distinguishing the conspiracy evidence from the evidence relevant to count 2 rendered this lay jury unable to perform its function effectively. It is said that reversal must follow despite the fact that the evidence of record is sufficient to support the jury's verdict finding all of the defendants guilty of the offense charged in count 2.

To me the premises contain an inherent contradiction in the light of the record. This jury was not sent out to deliberate blindly without adequate instruction as to the law applicable to count 2. Count 2 charged the possession of liquor which had been stolen from an interstate shipment of freight in violation of 18 U. S. C. 659. In his charge, Judge Mercer defined the crime charged by an accurate summary of the statutory language. A paragraph of the charge defined possession. All essential elements of the crime were stated with particularity. The jury was advised that it must find that the government had proved each of those essential elements beyond a reasonable doubt before it could find any of the defendants guilty. The guilty knowledge required by the statute was fully and concisely defined. The jury was told that the plea of not guilty entered by each of the defendants placed the whole burden upon the government to prove them guilty beyond a reasonable doubt.

precedent in *United States v. Pronger*, 7 Cir., 287 F. 2d 498, expressly held that the court's instruction was a clear invasion of the jury's function. The concurring opinion said of this instruction that it "... invited a substitution of the 'feeling of collective culpability for a finding of individual guilt'."

This petitioner urges that the instruction was more than an "invitation." It was, in effect, a pronouncement by the court that all the defendants were members of a conspiracy and a criminal joint enterprise in his judgment and that the jury, too, must so regard them.

Inasmuch as the Court of Appeals *en banc*, save one dissent, has now ruled that this does not constitute reversible error, it has decided an important question of everyday federal law which should be settled by this Court.

## 2.

After a key defense witness has testified to being told by the Government's chief witness that the defendants had nothing to do with the charges against them, but he had named them to save himself (App. 345-350), the prosecutor inquired into the witness' prior mental illness (which had exonerated him from a homicide charge arising out of his mother-in-law's death) thusly:

By Mr. Quan:

Q. You stated that your memory began to better about 1955, is that right?

A. Yes.

Q. Do you now recall killing your stepmother?

Motions by all for a mistrial were denied (App. 356-357).

The Government, also, elicited from its chief witness, that he was fleeing the country after trial because he had a

price on his head. Motions of all for a mistrial were denied (App. 242-243).

Finally, the efforts of one of the prosecutors and an agent of the Federal Bureau of Investigation to frighten this petitioner, during the trial, while at a motel and not in his lawyer's presence, from testifying in his own behalf was a wholly unworthy stratagem of incalculably unsettling affect on his later appearance and demeanor while on the stand (App. 324-325, 339-340).

The foregoing actions of the prosecution were a resort to unfair play "calculated to procure a wrongful conviction." *Berger v. United States*, 295 U. S. 78, 88; and, hence, it would appear that the duty to supervise the administration of criminal justice in the federal courts warrants, of itself, this court's exercise of its jurisdiction of this case. *McNabb v. United States*, 318 U. S. 332, 340.

#### CONCLUSION.

For the foregoing reasons, and those advanced by his copetitioners which may be applicable to him, David Falzone seeks the writ of certiorari.

Respectfully submitted,

DANIEL C. AHERN,

Atty. for David Falzone.

the District Judge told the jury that he had not by his charge to the jury or in any statement made by him during the course of the trial expressed any opinion upon the issues of fact, the weight of the evidence, or the credibility of the witnesses. One wonders what more a trial judge could have done. For my part, I am sufficiently naive to believe that these jurors were intelligent enough to understand the court's charge.

The zenith of appellate review of trial court decisions is reached when the reviewing court remains mindful of its own function and keeps ever in touch with reason and the realities of the world around it. One of those realities, and a recognized factor of judicial review, is the recognition of the frailties of man. An accused person is entitled to a fair trial, but not to a trial free of all error. *Fed. Rules of Crim. Procedure* 61; *Lutwak v. United States*, 344 U. S. 604 (1953). Were that not the rule, the judgment which could ever be affirmed would be well nigh impossible to achieve. I believe the majority of the court has now abolished that principle by reversing these judgments as to count I of this indictment upon an unsubstantial technicality viewed in an attitude separated from reality and oblivious to the context of this record.

The situation here is not at all comparable to that which existed in *United States v. Pronger*, 7 Cir. (1961), 287 F. 2d 498. In *Pronger*, the ruling upon admissibility and the comments found to be objectionable were made just prior to the court's charge to the jury. The sequence was such that those comments, for all practical purposes, were part of the charge. Under those circumstances, this court concluded that the effect of the Judge's comments was either to tell the jury that the conspiracy was proved, or to create a conflict in the charge itself which was inclined to confuse the jury.

"It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury."

The imperative of the issues, as I see them, precludes the need for any apology for the extent of the foregoing quotations. The comment made by the District Judge in his ruling upon the pending objections must be weighed in the light of the whole record, and the charge to the jury in particular. That the majority of this court is unwilling to do. In no other way can I see any foundation for their conclusion that the Judge's statement that evidence was "connected up" burned so hotly in the consciousness of these jurors for days that they were precluded from understanding the court's charge at the close of the case. If that be true, these jurors must still be perplexed at the expenditure of long days hearing evidence related to issues as to which they had already been peremptorily instructed.

In his charge at the close of the evidence, Judge Mercer correctly advised the jury that the jury must decide whether a conspiracy had been proved and whether each of the defendants had joined in that conspiracy. The jury was further told that the acts and statements of others might not be considered as evidence in its determination whether each of the defendants was a member of any conspiracy by them found to exist. It was told, also, that acts and statements of a co-conspirator could be considered as evidence against a defendant who did not participate therein only if the jury was satisfied that a conspiracy had been proved and that such defendant was found to be a member thereof. The jury was told, explicitly, what was the evidence upon which its verdict must be found. Finally,

## APPENDIX.

IN THE UNITED STATES COURT OF APPEALS  
For the Seventh Circuit.

Nos. 13915-18 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i>	} Appeals from the United States Dis- trict Court for the Southern District of Illinois, North- ern Division.
No. 13915 <i>vs.</i>	
JAMES ALLEGRETTI, <i>Defendant-Appellant.</i>	
UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i>	
No. 13916 <i>vs.</i>	
DAVID FALZONE, <i>Defendant-Appellant.</i>	
UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i>	
No. 13917 <i>vs.</i>	
FRANK LISCIANDRELLO, <i>Defendant-Appellant.</i>	
UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i>	
No. 13918 <i>vs.</i>	
LOUIS DARLAK, <i>Defendant-Appellant.</i>	

April 22, 1964

Before. SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James V. Allegretti, Louis A. Darlak, David Falzone and Frank Liscandrello, defendants, have severally appealed from judgments on

the verdict of a jury and their sentences to imprisonment in pursuance thereof.

Defendants were tried on an indictment charging in count I that they and Joseph Lisciandrello and Gerald Covelli conspired to possess goods which they knew were stolen from an interstate shipment, in violation of 18 U. S. C. A. § 371. In Count II they were charged with possession of Old Sunnybrook whiskey stolen in interstate commerce, and known to have been stolen, in violation of 18 U. S. C. A. § 2 and 659.

Although the indictment was returned in the district court for the Northern District of Illinois, Eastern Division, it was transferred to the district court for the Southern District of Illinois, Northern Division, for trial.

Defendant Joseph Lisciandrello, who suffered illness during the trial, was granted a mistrial.

The trial started on March 28, 1962. Ending on April 12, 1962, the jury heard the testimony of 20 government witnesses, as the court reserved its rulings upon repeated objections made by defense counsel to parts of the testimony, relating to acts, conversations and statements made by one or more of the defendants, out of the presence of the other defendants.

The district court, on April 12, 1962, spoke directly to the jury and said:

"Ladies and gentlemen, will you please give me your attention:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

*"The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions."* (Emphasis added.)

Relative to the allocation of functions between the judge and the jury, the jury was told at the outset of the charge that it was the judge of the factual issues, of the credibility of the witnesses and the weight of the evidence. Finally, the charge was concluded with the following instructions:

"Ladies and gentlemen, at the beginning of this charge, I advised you that the Court determines what the law is, but that you, the jury, must determine the fact questions presented by the indictment and the defendants' pleas of not guilty. It is important that you accept the law as given to you by the Court in this charge. It is equally important that you decide all questions of fact upon your appraisal of the credibility of the witnesses and the weight to be accorded to the evidence and that your appraisal of the weight and credibility of the evidence be not influenced by any expression of opinion by the Court upon those matters.

"From time to time as this trial has progressed, it has been my duty as judge to rule upon objections and to decide questions related to the admissibility of evidence. In the course of the trial I have made certain statements and comments to counsel from time to time. No statement or comment by me in either of those instances was intended as an expression of an opinion by this court as to the credibility of any witness or as to the weight or credibility of the evidence. I impress upon you, ladies and gentlemen of the jury, that my comments and remarks made from time to time during the trial should be so understood by you; and that nothing said by me during the course of the trial should be taken or understood by you as an expression of an opinion by this court upon either the weight or the credibility of the evidence.

the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. \* \* \*

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

"If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement given."

At another point in his charge, the court told the jury:

"If the accused be proved guilty beyond a reasonable doubt, say so. If not proved guilty beyond a reasonable doubt, say so.

"Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

*"Justice is done when the demands of the law are satisfied whenever a verdict is rendered in accordance with the proof made by all of the evidence to the satisfaction of the jury. \* \* \**

"I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants. [Emphasis supplied].

"At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.

"I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

"Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time."

Thereupon all defense counsel joined in a motion for a mistrial, on the ground that the court had invaded the province of the jury. That motion was denied. Thereupon the government rested its case, and the evidence in defense was received.

1. It is undisputed that the government had the burden of submitting to the jury sufficient evidence showing beyond a reasonable doubt that the conspiracy charged in count I existed and that defendants were members thereof. The court accordingly instructed the jury as to its duty in this respect. He also defined the term "conspiracy", as set forth in 18 U. S. C. A. § 371. The court characterized a conspiracy as "a kind of 'partnership in criminal purposes' in which each member becomes the agent of every other member."

Faced with the duty of deciding whether a conspiracy had been proved by the evidence, the jury was aware that the court had told it that the government had "shown to the satisfaction of the Court that a *connection* does exist between each such act, conversation and statement and the several defendants." (Italics supplied.) It was for this reason that the court instructed the jury that it might consider certain evidence, which it had mentioned, against such other defendants who were not then present, as well as against those defendants who were present and participating in such statements and conversations.

Of course the court had the duty to make a ruling upon the objections in question. However, we know of no requirement that the court state to the jury its *reasons* therefor. We have no doubt that a statement by the court that the government had shown to the satisfaction of the court that a connection existed between such relevant evidence and the various defendants charged with conspiracy, undoubtedly had the effect of conveying to the jurors the court's belief that a conspiracy existed, which was the very question which the jury was required to ascertain. We are convinced that a jury would construe the word "connection", used by the court in its oral statement, as closely akin to a conspiracy, as characterized by the court in the foregoing instruction.

In *United States v. Pronger*, 287 F. 2d 498 (1961), where defendant Pronger had appealed from a judgment convicting him on the verdict of a jury on a two-count indictment involving the movement in interstate commerce of a stolen automobile, it was urged at the trial that there was a common scheme or plan between Pronger and a second defendant. The court instructed the jury that it should find whether or not there was any common design or common concert of action between the defendants with regard to

doubt that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete; and it is complete as to every person found by you to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

"A conspiracy is an agreement between two or more persons to violate a law of the United States.

"In this case, the defendants are charged with having agreed, that is to say conspired, to possess merchandise which had been stolen from interstate commerce, knowing the same to have been stolen from interstate commerce.

"Before you can find any defendant guilty of the offense charged in Count 1 of the indictment, you must first find, beyond a reasonable doubt, that such defendant entered into an agreement with another person; that that agreement addressed itself to the knowing possession of merchandise; that that merchandise was stolen from interstate commerce; and that such defendant knew it so to have been stolen at the time of entering into the agreement.

"If the Government has failed to prove any of the foregoing elements as to any defendant, then you must find such defendant as to whom the Government has failed to make such proof in a fashion that satisfies your mind beyond a reasonable doubt, not guilty.

"In your consideration of the evidence as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that such conspiracy did exist, you should next determine whether or not the accused knowingly and willfully became a member of the conspiracy. \* \* \*

"Before a jury may find that a defendant, or any other person, has become a member of a conspiracy,

to evidence of one type or another. Through days this jury had observed the court in its function of determining questions of admissibility of evidence. Thus, the ruling in question is not an isolated incident, but only one of the many rulings upon admissibility which this jury observed and heard. The majority of this court must be little impressed with the efficacy of the jury system in general, and with the intelligence of this jury in particular. For my part, I believe it degrades both to conclude as the majority does, that this jury would mistake the comment in question for the statement of an opinion upon the issue of guilt.

We do not even have to conclude that the comment was not erroneous. If it be assumed to be error, when the comment is viewed in the light of this record it was harmless error.

Judge Mercer's ruling upon the pending objections came at the close of the government's case in chief. Thereafter, the trial continued for several days before the evidence was closed. The extent of the time elapsed between the comment in question and the court's charge to the jury is suggested by the fact that a narrative summary of the evidence for the defendants and the rebuttal evidence by the government fills 138½ pages of the printed appendix. The probable effect of the comment upon the jury must be determined in the light of that fact, and, further, by viewing the comment in its proper context with the court's final charge to the jury.

This trial closed with a charge in detail stating the law which the jury would apply. The point is best illustrated by quoting, verbatim, pertinent parts of that charge.

After defining the crime of conspiracy in his charge, the trial judge instructed the jury, in pertinent part:

"If you find from the evidence beyond a reasonable

the charges made and that the jury should determine, from evidence, whether or not the defendants were guilty of the charges. In referring to certain remarks of the court, we said, at 500:

"In a case such as this a defendant cannot be bound by the acts or declarations of another defendant until the common design or common concert of action between the two defendants and their participation have been established. *Glasser v. United States*, 315 U. S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680; *United States v. United States Gypsum Co.*, D. C., 67 F. Supp. 397, 451; *May v. United States*, 84 U. S. App. D. C. 223, 175 F. 2d 994, 1008.

"Whether intentional or not, we believe that the court's remarks had the effect of telling the jury that the government had proved that the common design or common concert of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach v. United States*, 326 U. S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350."

We reversed as to defendant Pronger and remanded for a new trial.

In the case at bar, in attempting to justify the statement by the district court that the government had shown to the court's satisfaction that a connection existed between the evidence to which the court referred and the various defendants, government counsel rely on *United States v. Bernard*, 287 F. 2d 715 (1961). However, at 720, it appears that the district court's statement to the jury not only was different from that used in the case at bar, but was properly limited so as not to convey to the jury the opinion of the court that a common plan or design had been shown to exist.

But the court did instruct that evidence, with certain exceptions, which when received was not to be considered against any defendant to whom the evidence did not pertain, could thereafter be considered as to all defendants if the jury found that there was a common plan or design proved.

We there held that the question of whether there was such a plan or design was properly submitted to the jury.

At no place in *Bernard* did it appear that the district court attempted to give any reason or explanation for its ruling, which was undoubtedly correct. The court simply announced to the jury its ruling admitting the evidence against all defendants, but left to the jury the question of deciding whether a common plan or design was proved beyond a reasonable doubt. We adhere to the opinion written by District Judge Mercer, who sat with us in deciding that case.

We are constrained to hold that, in the case at bar, the expression of the court's reasons did have the effect of suggesting to the jurors that the court believed that a conspiracy existed, and for that reason invaded the province of the jury. This requires a reversal of the judgments and sentences on count I.

2. In view of our holding in regard to count I, it becomes necessary to consider the verdict, judgments and sentences, insofar as they pertain to count II, which charges defendants with possession of whiskey stolen from a shipment in interstate commerce and known by them to have been stolen.

The court instructed the jury that each offense and the evidence applicable thereto should be considered separately. The jury was further instructed, specifically as to count II, that the essence of the offense there charged "is guilty

principles of law to his ruling. What they do conclude is that Judge Mercer may have conveyed to the jury the idea that the conspiracy was proved because he stated the reason for his ruling that the evidence was admitted as to all of the defendants.

One must read certain parts of the court's comments out of context to find any such implication therein. In pertinent part, Judge Mercer said:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections had been made, I reserved my ruling thereon, upon the government's avowal to connect up such testimony.

"I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants."

So stating, the court then overruled all pending objections and admitted the evidence as to all defendants.

It must be remembered that this jury, during days of trial proceedings, had heard the United States Attorney promise upon many, many occasions that the government would "connect up" testimony then being offered in evidence. In the light of that fact, it seems clear to me that that same jury, hearing the court's reference to "connected up" and "connection" in context, would understand that the comments related only to the question of the admissibility of the evidence, not to an ultimate issue of the case. Furthermore, this was not a one day trial. A narrative summary of the trial proceedings fills 377 printed pages of the appendix. Those pages reveal many, perhaps hundreds, of rulings by the court upon objections

defendants who were not present when the acts were done or the statements made involves a determination by the trial judge that, independently of the statements of others, there is evidence adduced that a conspiracy existed and that the party against whom the evidence is sought to be introduced was a party to the conspiracy. The court must also be satisfied that the act or statement was done or made while the conspiracy existed and that it was in furtherance of the conspiracy. *E.g. Krulewitch v. United States*, 336 U. S. 440 (1949); *Glasser v. United States*, 315 U. S. 60 (1942); *United States v. Konovsky*, 7 Cir. (1953), 202 F. 2d 721, 727; *Allen v. United States*, 7 Cir. (1924), 4 F. 2d 638, 694, rehearing den. (1925). The determination of such facts upon which admissibility depends is the province of the trial judge. *United States v. Dennis*, 2 Cir. (1950), 183 F. 2d 201, 230-231, affirmed 341 U. S. 494; *Carbo v. United States*, 9 Cir. (1963), 314 F. 2d 718, 737.

This trial was no exception. Repeatedly, during the presentation of the government's case, evidence of acts and statements by one or more of the alleged conspirators<sup>1</sup> was presented. Objections were made by all defendants not shown to have participated in such acts or statements. Upon the government's avowal that the tendered evidence would be "connected up" Judge Mercer reserved his ruling upon such objections. By the close of the government's case, there remained pending a great number of such objections upon which the court's ruling was reserved. Upon a motion by the government, Judge Mercer overruled all pending objections and admitted the evidence as to all of the defendants.

The majority of the court does not hold that that ruling was error, or that the trial judge failed to apply correct

1. The appellants and Joseph Lisciandrello who was not then on trial.

knowledge on the part of the accused that the goods were stolen". The jury was correctly told:

"\* \* \* The crime as alleged in Count II consists of possessing it knowing said goods to have been stolen, and you cannot find the defendant guilty of Count II of this indictment unless you believe beyond a reasonable doubt that such defendants knew the goods were stolen, but it is not necessary to warrant a conviction under Count II that the defendant knew the goods were stolen from an interstate shipment. They must indeed have been stolen from an interstate shipment of freight, but it is sufficient guilty knowledge if he knows they were stolen."

To us it is apparent that the government had the burden of proving that each of the four defendants on trial knew that the goods were stolen. The burden of proof beyond a reasonable doubt, of course, rested upon the government, but, as to count II, the government's case did not rely upon the existence of a conspiracy, as charged in count I. In this situation the difficult task placed upon the jury in its consideration of the evidence was to separate those parts which were admitted under the conspiracy count, from any evidence tending to prove the charge in count II.

Considering the length of the trial, the number of witnesses and the difficulties inherent in making this separation in their minds, it is our opinion that laymen jurors would have become so confused as to be unable to perform their function effectively. The error in the court's remarks to the jury could not practically have been confined in the juror's minds to count I when the jury was also considering the evidence insofar as applicable *only* to count II. Thus we are required to reverse the judgments and sentences on count II.

We find it appropriate to make these remarks, in view of the fact that we have contemplated the possibility of

affirming the convictions on the basis of the verdict on count II only.

3. In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendants' contention to the contrary.

4. Defendants have also alleged and assigned as error the admission of irrelevant, incompetent and prejudicial evidence, improper limiting of cross-examination, misconduct of government counsel, a denial of defendants' rights under 18 U. S. C. A. § 3500, a failure of the district court to examine the grand jury minutes of the testimony of witness Olshon in the circumstances, and errors by the court in the giving, and failure to give, certain instructions.

Inasmuch as we shall direct a new trial of this case, it is unnecessary at this time to rule upon these alleged errors. There is no reason to believe that, if errors in these respects were in fact committed, they will be repeated upon another trial.

For all of these reasons, the judgments and sentences from which these appeals were taken are reversed and this case is remanded for a new trial.

REVERSED AND REMANDED.

Nos. 13915-18

CASTLE, *Circuit Judge*, specially concurring. I agree with Judge Schmackenberg's resolution of the issue he finds dispositive of the appeals. The concern so vigorously expressed by our brother, Judge Knoch, appears to overlook that *the merits of the jury system can be preserved and protected only by permitting it to operate without interference by the trial court*. Praise of the system does not serve to overcome the departure therefrom evidenced by the record before us. It is essential to the proper preservation and operation of the jury system that the court not invade the province reserved to the jury—either directly or indirectly. It is unfortunate that the error occurred. That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks. And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the "feeling of collective culpability for a finding of individual guilt." Cf. *United States v. Bufalino*, 2 Cir., 285 F. 2d 408, 417.

Nos. 13915-18

KNOCH, *Circuit Judge* (dissenting): I cannot agree with the majority opinion and decision, and I therefore dissent. I am convinced that there is no substantial basis for reversal of these judgments as to count 1 of the indictment and no basis whatsoever for reversal of the judgments entered upon count 2 thereof.

A conspiracy trial inevitably presents the perplexing question as to the admissibility of evidence of acts and statements done or made by one or more of the defendants, but without the participation of all of the other defendants. The rule for the admission of such evidence against

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FILED

20

FEB 25 1965

No. 925

JOHN R. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

LOUIS DARLAK,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

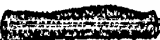
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT:

FRANK W. OLIVER

30 N. La Salle Street

Chicago, Illinois 60603

*Attorney* 

App. 30

UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
Chicago, Illinois.

Thursday, January 21, 1965

Before

Hon. John S. Hastings, Chief Judge  
Hon. F. Ryan Duffy, Circuit Judge  
Hon. Elmer J. Schnackenberg, Circuit Judge  
Hon. Wm. G. Knoch, Circuit Judge  
Hon. Latham Castle, Circuit Judge  
Hon. Roger J. Kiley, Circuit Judge  
Hon. Luther M. Swygert, Circuit Judge

Nos. 13915, 13916, 13917, 13918

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*vs.*

JAMES ALLEGRETTI, DAVID FALZONE,

FRANK LISCIANDRELLO, LOUIS DAR-

LAK,

*Defendants-Appellants.*

Appeals from the  
United States Dis-  
trict Court for the  
Southern District  
of Illinois, North-  
ern Division.

IT IS HEREBY ORDERED by the Court sitting *en banc* that  
the petitions for rehearing filed in the above-captioned ap-  
peals be, and the same are hereby DENIED.

(Judge Schnackenberg voted to grant petitions for re-  
hearing.)

The Trial Court also instructed the jury regarding the definition of an accomplice and the caution to be exercised in weighing his evidence. Whether Lou Fushanis was or was not an accomplice or co-conspirator was an issue of fact which was presented to the jury by a conflict in the evidence. It was not error for the District Judge to refuse to underline the testimony of one of the witnesses and his inferences respecting this issue. If the jury concluded Lou Fushanis was an accomplice, then they had been told how to treat his testimony, and they had adequate instructions in interpreting that testimony with respect to the basic issues of the innocence or guilt of the defendants.

We have reviewed all other points raised by the defendants. After due consideration, we find that none operates to alter our conviction that the judgment of the District Court must be affirmed.

AFFIRMED.

SOHNACKENBERG, *Circuit Judge*, partly concurring and partly dissenting.

I approve and concur in Judge Knoch's opinion insofar as it is not inconsistent with the majority opinion of this court filed on April 22, 1964.

The comment of a judge who concurred is pertinent:

" \* \* \* And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the 'feeling of collective culpability for a finding of individual guilt.' "

I would reverse the district court in this case and remand it for a new trial.

nied a motion for production of the Grand Jury transcript of his testimony to ascertain whether he had or had not mentioned this conversation. No such particularized need was shown for such production as to outweigh the traditional maintenance of secrecy surrounding grand jury proceedings. It was not error to deny the motion. *U. S. v. Magin*, 7 Cir. 1960, 280 F. 2d 74, 79; *U. S. v. Nasser*, 7 Cir., 1962, 301 F. 2d 243, 245, and cases there cited.

We have given particularly close consideration to the assertion that cross examination of government witnesses was unduly limited to the prejudice of the defendants. In every such instance cited by the defendants, the Trial Judge sustained objections to the questions as beyond the scope of the direct examination. The defendants concede the traditionally wide latitude given to a Trial Judge in controlling cross examination, but argue that the principle has here been expanded to keep relevant facts from the jury according possible collaboration between Lou Fushanis, one of his employees, and Gerald Covelli, sought to be introduced by way of cross examination. Our study of the matter leads us to the opposite view that the Trial Judge did not abuse his authority in this respect. One of the explanations given for the effort to introduce the evidence sought to be elicited by way of cross examination is that the defense could hardly be expected to call Gerald Covelli as its witness. The difficulties inherent in trial tactics cannot be permitted to dilute the authority of a Trial Judge to control the trial. We find no error here.

Contrary to defendant's contention, the Trial Judge did instruct the jury that to find defendants guilty they must find them to have known that the merchandise involved was stolen from interstate commerce. It was not necessary to give repetitious instructions tendered by the defense.

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not to strike but to declare a mistrial. A typical instance was Gerald Covelli's statement that there was a price on his head. The Trial Judge ordered the statement stricken and instructed the jury to disregard it. Gerald Covelli had been asked on cross-examination about having studied Spanish and Italian in Leavenworth and had denied that he proposed to go to Rio de Janeiro to take "off a diamond score." It was proper on redirect to cover the same subject matter. On redirect, Covelli said he was studying those languages because he proposed ultimately to leave the country and live elsewhere. He then added, not responsively, "I could never live peacefully in this country, because there is a price on my head now." Later Robert Westerhausen testified that Gerald Covelli had admitted to him that he intended to go to Brazil to steal diamonds and that he was studying Spanish for that purpose. We do not consider this, or the other similar actions by the Trial Judge, as bases for reversal.

It is further contended that the defendants were denied their rights under 18 U.S.C. § 3500 (Jencks Act) with respect to the witness Max Olshon. It is apparent from our own close study in camera of the documents in question, which included both direct statements of witnesses and reports of government agents, which the Trial Judge examined in camera, that he did not, as feared by defense counsel, limit the word "statements" as used in the statute to mean only such statements as the witness had himself set down on paper. We find no error in this regard. Max Olshon testified to a conversation with David Falone on March 18, 1959. The prior statement of Max Olshon which was produced did not refer to this conversation. Objection was sustained to the question whether he had told the Grand Jury about it. The Trial Court de-

The cross-examination of Mr. Westerhausen brought out the details of his prior long history of mental incapacity, although he had since been judicially determined as restored to sanity. On redirect, Mr. Westerhausen testified to the nature and extent of his prior mental disease and its cure beginning in 1955 with the result, he stated, that his memory began to improve. On re-cross, Mr. Westerhausen said again that his memory had begun to improve about 1955. The government counsel then asked whether Mr. Westerhausen now recalled killing his step-mother. The Trial Judge sustained objections to this and instructed the jury:

"The jury is instructed and admonished by the Court to pay no attention whatever to the last improper question by the Government."

It is contended that this admonition was insufficient and that a motion for mistrial should have been allowed. Although adjudged restored to sanity, the witness's interest, possible prejudices and accuracy of memory, and factors affecting these, were all proper subjects of cross-examination. The government was entitled to elicit pertinent circumstances affecting his credibility. *U.S. v. Lawinski*, 7 Cir. 1952, 195 F. 2d 1, 7. As the government argues, Mr. Westerhausen's mental history was extremely complex, *U.S. v. Westerhausen*, 7 Cir., 1960, 283 F. 2d 844, 848, including not only loss of memory, but auditory hallucinations. After carefully weighing the matter, we do not agree that this one question, which the Trial Judge held to be improper, and on which the jury were promptly instructed, required a mistrial. Similarly, we find no reversible error in the failure of the prosecution to follow up with affirmative proof its questions to which Mr. Westerhausen gave negative answers.

In several instances, the Trial Judge ordered parts of the testimony stricken although the defendants had moved

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1964.

No.

LOUIS DARLAK,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

### PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To The Honorable, The Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

The petitioner, Louis Darlak, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

### JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Southern District of Illinois, Northern Division, was entered on June 26, 1962. It is not reported but appears in the certified, printed, joint appendix filed herewith.

The original opinion of the United States Court of Appeals for the Seventh Circuit, filed April 22, 1964, was not published and is set forth in the appendix to this petition.

The contrary opinion of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, on a rehearing filed December 22, 1964, was not published and is set forth in the appendix to this petition.

### JURISDICTION.

The order of the United States Court of Appeals, affirming the judgment and sentence of the United States District Court for the Southern District of Illinois, Northern Division, was filed December 22, 1964. The petition for rehearing was denied on January 21, 1965. This petition is seasonably filed under Rule 22 of this court.

Jurisdiction in this court to review the judgment below is provided in 28 U.S.C. 1254 (1).

### QUESTIONS PRESENTED.

1. Was it not a denial of the petitioner's right to trial by jury for the trial judge to instruct the jury at the close of the Government's evidence in chief that the Government had shown to the satisfaction of the court that a connection existed between numerous acts and declarations of co-defendants and this petitioner, and, hence, were admissible against him even though he was absent during these actions and declarations.

2. Did not the Government resort to an aggregate of misconduct contrary to the minimal standards of fair play in asking of an important defense witness the irrelevant but destructive question of whether he recalled killing his stepmother; and in eliciting from its principle accomplice

lants as reversible error, and must conclude that the position of the defense on this point is not well founded.

It is contended that post conspiracy declarations of one co-defendant, although admitted as to him alone (a matter on which the jury was instructed) were elicited with intent to prejudice the other defendants. Some of these declarations were made in the course of conversation between David Falzone, Gerald Covelli, and various government agents, including William D. Weatherwax, in the U.S. Attorney's office. During cross-examination of Gerald Covelli reference was made to contradictions between his prior statements and his trial testimony. Gerald Covelli was explaining this on re-direct, pointing out that he had been corrected by David Falzone as to certain dates and places in the course of the above conversation. The corrections and attendant comments made by David Falzone, and described by Gerald Covelli, were incriminatory admissions of David Falzone and were clearly admitted only as evidence against Falzone. These admissions were corroborated by the testimony of a government agent present at the time who was properly permitted to testify to that effect and to the attendant circumstances, including the questions and comments in answer to which the incriminatory admissions were made.

The testimony of Gerald Covelli was a vital part of the government's case. The defense witness Robert Westerhausen testified that while he and Covelli were prisoners at Leavenworth, Covelli told him in the course of many conversations that he was being paid to implicate his co-defendants, who in fact had nothing to do with the stolen liquor, in order to shield the real culprits.

cafes. Even while in the custody of the Federal Bureau of Investigation, David Falzone was still issuing instructions for disposition of a part of the stolen liquor. Max Olshon testified that when released on bond, David Falzone stated that he was not unduly worried because Jimmy Allegretti would "straighten out the whole case." Gerald Covelli testified that he and David Falzone then engaged in efforts to raise the money requested by James Allegretti for that purpose. There was evidence that David Falzone continued to participate in the conspiracy. *U.S. v. Agueci*, 2 Cir., 1962, 310 F. 2d 817, 839, and cases there cited. It was not necessary for the government to prove what, if anything, James Allegretti actually did to "straighten out the case," and continue the conspiracy. There was evidence that he asked for money and that, after David Falzone's arrest and release on bond, Falzone and Gerald Covelli did raise such sums which were turned over to James Allegretti to be used for that purpose.

David Falzone testified that he had seen Agent Weatherwax casually at a motel in April, 1962, had started a conversation with him, and that Agent Weatherwax, on hearing that Falzone proposed to testify at the trial, had said, "Don't be a fool, we will murder you on that stand." On cross-examination, the government attempted in vain to elicit certain testimony of further conversation with Agent Weatherwax respecting David Falzone's reasons for testifying as he did. Under the circumstances, it was proper rebuttal for Agent Weatherwax to testify to those further conversations and to incriminating admissions made by David Falzone in the course of such conversations.

We have scrutinized all the other examples of such evidence, the admission of which is characterized by appel-

witness that he was leaving the country after the trial because he had a price on his head; and in the efforts of one of the assistant district attorneys and an agent of the Federal Bureau of Investigation to frighten a co-defendant from testifying in his own behalf?

### CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States:

Article III, Section 2:

"... The Trial of all Crimes, except in Cases of Impeachment shall be by Jury;"

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

### STATUTES INVOLVED.

Title 18 U.S.C. Section 371. Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18 U.S.C. Section 659. Interstate or Foreign Baggage, express or freight.

"... Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both...."

cases, transferring it to other containers, raising funds to enable the conspiracy to continue after government agents had arrested one of the conspirators and after raids on some of the cafes involved, or making false exculpatory statements to the government agents.

There were sharp conflicts in the testimony and in numerous instances the jury would have to resolve issues of credibility. Viewed in the light most favorable to the government, the evidence supports the convictions. *Glasser v. U.S.*, 1942, 315 U.S. 60, 80.

We do not adopt the majority opinion of April 22, 1964, with respect to the comments made by the Trial Judge in connection with his ruling on the admissibility of acts and statements of certain defendants in evidence against other defendants. It was on the basis of those comments that the majority, in the opinion of April 22, 1964, based its reversal of the convictions here appealed. We adopt instead the dissenting opinion to the effect that the statements of the Trial Judge did not constitute reversible error. .... F. 2d ....., beginning at page .....

The defendants contend that statements made by alleged co-conspirator defendant David Falzone after his arrest were improperly admitted in evidence against other defendants. Their theory is that with the arrest of David Falzone, and the raids made the same day on some of the cafes where the stolen whiskey was stored, the conspiracy to possess liquor stolen from interstate commerce had come to rest. The evidence in the record supports a contrary holding that David Falzone's arrest did not terminate the conspiracy. Gerald Covelli testified to seeing some of the stolen whiskey in the possession of fellow conspirators two weeks after the earlier raids on some of the

nature of these proceedings is sufficiently set out to make repetition here unnecessary.

We have enjoyed the benefit of oral argument on such re-consideration together with the record and the briefs of counsel.

On reconsideration, this Court adopts the majority opinion handed down April 22, 1964, insofar as that opinion concluded that the evidence was sufficient to convict all the defendants herein on both counts of the indictment of (1) conspiracy to possess whiskey stolen from interstate commerce knowing such whiskey was stolen from interstate commerce, and (2) as to each defendant of knowingly possessing the stolen whiskey.\*

The trial was a long one. The conspiracy disclosed by the evidence was complicated. There was ample proof that the whiskey in question was stolen from an interstate shipment and abundant circumstantial evidence from which the jury could have concluded that each defendant must have known that the whiskey was stolen. The record shows that all of the defendants contributed to carrying out the object of the common conspiracy to possess the stolen whiskey. We deem it unnecessary to narrate the details of their activities. The record discloses that each engaged in one or more of such acts as storing the whiskey, directing or carrying out its distribution to various cafes, operating those cafes, stowing the whiskey there, and, in some

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\* In the opinion of April 22, 1964, ..... F.2d ....., at page ....., the Court stated: "In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendants' contention to the contrary."

#### STATEMENT OF THE CASE.

The petitioner, Louis Darlak, was indicted, together with James Allegetti, David Falzone, Frank Lisciandrello and Joseph Lisciandrello, on June 30, 1960, under two counts, one, charging a conspiracy, contrary to Title 18, Section 371, United States Code, to possess whiskey, valued in excess of \$100.00, which had been stolen from an interstate shipment; and, two, for possession of this whiskey, contrary to Title 18, Section 659, United States Code.

All defendants (excepting Joseph Lisciandrello who was severed because of illness during the trial) were found guilty by a jury of both counts and on June 26, 1962, each was sentenced to serve five years imprisonment under the conspiracy charge and seven years imprisonment, to be concurrently served, under the possession charge. A three thousand dollar fine was also imposed on each of the defendants.

On April 22, 1964, the majority of a three judge division of the Court of Appeals reversed the judgment and sentence of the trial court and remanded the case for a new trial.

On December 22, 1964, six of the seven judges sitting *en banc* on a rehearing rejected the earlier majority opinion and adopted the minority opinion, affirming the judgment and sentences below.

On January 21, 1965, six of the seven judges sitting *en banc* denied the petitions for rehearing.

### STATEMENT OF FACTS.

During the course of the trial of this case the Government presented 20 witnesses in chief who testified to many acts, declarations, and statements by one or more of the alleged coconspirators, including those of the Government's principal witness, Gerald Covelli, a self styled accomplice, to which this petitioner and all nonparticipating defendants objected. On each such occasion, the court reserved its ruling on the avowal of the prosecution to connect up this testimony.

At the close of the Government's evidence, the prosecution moved to admit all of the testimony as to these acts and declarations against all of the defendants.

Whereupon the court instructed the jury thusly:

"Ladies and gentlemen, will you please give me your attention:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

"I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.

"At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present

IN THE UNITED STATES COURT OF APPEALS,  
For the Seventh Circuit.

SEPTEMBER TERM, 1964—SEPTEMBER SESSION, 1964

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13915 *vs.*  
JAMES ALLEGRETTI,  
*Defendant-Appellant.*

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13916 *vs.*  
DAVID FALZONE,  
*Defendant-Appellant.*

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13917 *vs.*  
FRANK LISCIANDRELLO,  
*Defendant-Appellant.*

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13918 *vs.*  
LOUIS DARLAK,  
*Defendant-Appellant.*

Appeals from the  
United States Dis-  
trict Court for the  
Southern District  
of Illinois, North-  
ern Division.

December 22, 1964

Before HASTINGS, *Chief Judge*, and DUFFY, SCHNACKEN-  
BERG, KNOCH, CASTLE, KILEY and SWYGERT, *Circuit Judges*,  
en banc.

KNOCH, *Circuit Judge*. This matter came before the  
Court for reconsideration of its opinion previously ren-  
dered on April 22, 1964, ..... F. 2d ....., in which the

The jury system assumes that the persons selected after proper voir dire to serve as jurors are equipped with a sufficient degree of intelligence and literacy to understand and comprehend the English language. The system also presumes that jurors can take the law as given to them by the courts, apply the law to the evidence before them, and through that process, render their verdict. I am not willing to presume that any member of this jury was so lacking in intelligence and understanding that he or she was unable to perform his duty. Without making such a presumption, I can find no support for the decision which the majority of this court has reached. I have a strong respect for the fundamental right of *every* accused person to a *fair* trial. I have an equally strong respect for the requirement of an orderly judicial process at both the trial court and appellate level. It is my opinion that we will further neither of those causes if these judgments are reversed. Fair trial must, of necessity, not mean "perfect" trial. It must successfully protect the rights of each individual accused, and, at the same time, protect society in general. Only thus will it preserve that high respect for law and order (which is sadly lacking in many areas of our national existence today) without which our form of life and government would soon perish.

In the absence of a single iota of proof to the contrary, I confidently believe this jury conscientiously performed the duty which they were empanelled and sworn to perform. Upon this record, each of the defendants has had a fair trial. The evidence of record fully supports the jury's verdict upon each count of the indictment and against each of the defendants. I cannot agree we should sift the record with a fine sieve to find a slight imperfection which could not have enured to the prejudice of any of the defendants for reversal of these judgments.

I would affirm the judgment upon each of these appeals.

when such acts were done, such conversations were had or such statements were made.

"I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

"Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time."

The motions of all defendants for a mistrial on the ground that the court had invaded the province of the jury were denied (App. 296-298).

On the direct examination of Gerald Covelli the Government elicited from the witness that after the trial he was leaving the country because there was a price on his head. Whereupon the motions of all defendants for a mistrial were denied (App. 242-243).

During the Government's cross examination of Robert Westerhausen, the prosecution asked whether he recalled killing his step-mother. The motions of all defendants for a mistrial were denied (App. 356-357).

In the midst of the trial, one of the Assistant United States Attorneys conducting the trial and an agent of the Federal Bureau of Investigation called upon co-defendant David Falzone at the motel where he was staying and told him he was a fool to take the stand in his defense and, if he did, they would murder him (App. 324-325, 339-340).

### ARGUMENT.

The Court should grant the writ of certiorari in this case for two reasons:

First, the opinion below has decided an important question of federal law which has not been, but should be, settled by this court.

Second, the opinion below disregards the duty to supervise the administration of criminal justice in the federal courts.

#### 1.

Where, as in this case, the Government indicts several persons as both coconspirators, under count one, and as members of a joint enterprise to possess property stolen from an interstate shipment, under the second count, it is a basic right of each defendant to have his case decided individually by the jury. *Constitution of the United States*, Article III, Section 2; Amendment VI.

Moreover, it is the jury's province to determine whether each defendant has been shown by credible evidence of his own conduct, only, to have been a member of the alleged conspiracy or a member of the joint enterprise before hearsay actions and utterances of his codefendants may be considered as evidence bearing on his guilt. *Carbo v. United States*, 9 Cir., 314 F. 2d 718, 735-737; *United States v. Dennis*, 2 Cir., 183 F. 2d 201, 230-231.

Yet, the trial judge, in this matter, at the close of the Government's case in Chief (App. 296-297), instructed the jury as a matter of law that sufficient independent, credible evidence of the membership of all the defendants in the conspiracy and joint enterprise had been shown.

The majority opinion of April 22, 1964, following its

advised that it must find that the government had proved each of those essential elements beyond a reasonable doubt before it could find any of the defendants guilty. The guilty knowledge required by the statute was fully and concisely defined. The jury was told that the plea of not guilty entered by each of the defendants placed the whole burden upon the government to prove them guilty beyond a reasonable doubt.

Finally, the jury was charged as follows:

"It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined upon the evidence which has been admitted against him.

"As you have noted, a separate crime or offense is charged against each of the defendants in each count of the indictment. Each offense and the evidence applicable thereto should be considered separately. The fact that you find some or all of the accused guilty or not guilty of the offenses charged should not control your verdict with respect to any other offense charged."

The charge given was complete and adequate. Upon this record, the jury can have ignored the conspiracy evidence and, yet have found beyond all reasonable doubt that the whiskey was stolen from an interstate shipment of freight, that each of the defendants had possession of all, or some, of the whiskey and that each of them knew that the whiskey had been stolen. I agree with the majority of the court that the evidence of record is sufficient to prove every essential element of the offense and the guilt of each of the defendants.

to the court's charge to the jury. The sequence was such that those comments, for all practical purposes, were part of the charge. Under those circumstances, this court concluded that the effect of the Judge's comments was either to tell the jury that the conspiracy was proved, or to create a conflict in the charge itself which was inclined to confuse the jury.

By contrast, the comment here involved was made at the close of the government's case, with several days of trial, as summarized in almost 140 printed pages of narrative in the appendix, intervening between the comment itself and the final charge of the jury. The error, if any, was harmless, when viewed in its context in this record.

The majority opinion and decision reversing these judgments as to the substantive count of the indictment, count 2, is even more devoid of logic than is the majority opinion relative to count 1. The only reason assigned for reversal as to count 2 is that the difficulty of distinguishing the conspiracy evidence from the evidence relevant to count 2 rendered this lay jury unable to perform its function effectively. It is said that reversal must follow despite the fact that the evidence of record is sufficient to support the jury's verdict finding all of the defendants guilty of the offense charged in count 2.

To me the premises contain an inherent contradiction in the light of the record. This jury was not sent out to deliberate blindly without adequate instruction as to the law applicable to count 2. Count 2 charged the possession of liquor which had been stolen from an interstate shipment of freight in violation of 18 U.S.C. 659. In his charge, Judge Mercer defined the crime charged by an accurate summary of the statutory language. A paragraph of the charge defined possession. All essential elements of the crime were stated with particularity. The jury was

precedent in *United States v. Pronger*, 7 Cir., 287 F. 2d 498, expressly held that the court's instruction was a clear invasion of the jury's function. The concurring opinion said of this instruction that it "... invited a substitution of the 'feeling of collective culpability for a finding of individual guilt'."

This petitioner urges that the instruction was more than an "invitation." It was, in effect, a pronouncement by the court that all the defendants were members of a conspiracy and a criminal joint enterprise in his judgment and that the jury, too, must so regard them.

Inasmuch as the Court of Appeals *en banc*, save one dissent, has now ruled that this does not constitute reversible error, it has decided an important question of everyday federal law which should be settled by this Court.

## 2.

After a key defense witness has testified to being told by the Government's chief witness that the defendants had nothing to do with the charges against them, but he had named them to save himself (App. 345-350), the prosecutor inquired into the witness' prior mental illness (which had exonerated him from a homicide charge arising out of his mother-in-law's death) thusly:

By Mr. Quan:

Q. You stated that your memory began to better about 1955, is that right?

A. Yes.

Q. Do you not recall killing your stepmother?

Motions by all for a mistrial were denied (App. 356-357).

The Government, also, elicited from its chief witness, that he was fleeing the country after trial because he had a

price on his head. Motions of all for a mistrial were denied (App. 242-243).

Finally, the efforts of one of the prosecutors and an agent of the Federal Bureau of Investigation to frighten co-defendant David Falzone, during the trial, while at a motel and not in his lawyer's presence, from testifying in his own behalf was a wholly unworthy stratagem of incalculably unsettling effect on his later appearance and demeanor while on the stand (App. 324-325, 339-340).

The foregoing actions of the prosecution were a resort to unfair play "calculated to procure a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88; and, hence, it would appear that the duty to supervise the administration of criminal justice in the federal courts warrants, of itself, this court's exercise of its jurisdiction of this case. *McNabb v. United States*, 318 U.S. 332, 340.

Co-defendants James Allegretti and David Falzone have filed their Petitions for Writs of Certiorari. This petitioner hereby adopts the arguments presented in their petitions before this Court.

#### CONCLUSION.

For the foregoing reasons, and those advanced by his co-petitioners which may be applicable to him, Louis Darlak seeks the writ of certiorari.

Respectfully submitted,

FRANK W. OLIVER,  
Atty. for Louis Darlak.

by them found to exist. It was told, also, that acts and statements of a co-conspirator could be considered as evidence against a defendant who did not participate therein only if the jury was satisfied that a conspiracy had been proved and that such defendant was found to be a member thereof. The jury was told, explicitly, what was the evidence upon which its verdict must be found. Finally, the District Judge told the jury that he had not by his charge to the jury or in any statement made by him during the course of the trial expressed any opinion upon the issues of fact, the weight of the evidence, or the credibility of the witnesses. One wonders what more a trial judge could have done. For my part, I am sufficiently naive to believe that these jurors were intelligent enough to understand the court's charge.

The zenith of appellate review of trial court decisions is reached when the reviewing court remains mindful of its own function and keeps ever in touch with reason and the realities of the world around it. One of those realities, and a recognized factor of judicial review, is the recognition of the frailties of man. An accused person is entitled to a fair trial, but not to a trial free of all error. *Fed. Rules-of-Crim. Procedure* 61; *Lutwak v. United States*, 344 U.S. 604 (1953). Were that not the rule, the judgment which could ever be affirmed would be well nigh impossible to achieve. I believe the majority of the court has now abolished that principle by reversing these judgments as to count I of this indictment upon an unsubstantial technicality viewed in an attitude separated from reality and oblivious to the context of this record.

The situation here is not at all comparable to that which existed in *United States v. Pronger*, 7 Cir. (1961), 287 F. 2d 498. In *Pronger*, the ruling upon admissibility and the comments found to be objectionable were made just prior

# APPENDIX

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as to the weight or credibility of the evidence. I impress upon you, ladies and gentlemen of the jury, that my comments and remarks made from time to time during the trial should be so understood by you; and that nothing said by me during the course of the trial should be taken or understood by you as an expression of an opinion by this court upon either the weight or the credibility of the evidence.

"It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury."

The imperative of the issues, as I see them, precludes the need for any apology for the extent of the foregoing quotations. The comment made by the District Judge in his ruling upon the pending objections must be weighed in the light of the whole record, and the charge to the jury in particular. That the majority of this court is unwilling to do. In no other way can I see any foundation for their conclusion that the Judge's statement that evidence was "connected up" burned so hotly in the consciousness of these jurors for days that they were precluded from understanding the court's charge at the close of the case. If that be true, these jurors must still be perplexed at the expenditure of long days hearing evidence related to issues as to which they had already been peremptorily instructed.

In his charge at the close of the evidence, Judge Mercer correctly advised the jury that the jury must decide whether a conspiracy had been proved and whether each of the defendants had joined in that conspiracy. The jury was further told that the acts and statements of others might not be considered as evidence in its determination whether each of the defendants was a member of any conspiracy

APPENDIX

IN THE UNITED STATES COURT OF APPEALS  
For the Seventh Circuit

Nos. 13915-18 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13915 *vs.*  
JAMES ALLEGRETTI,  
*Defendant-Appellant.*

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13916 *vs.*  
DAVID FALZONE,  
*Defendant-Appellant.*

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13917 *vs.*  
FRANK LISCIANDRELLO,  
*Defendant-Appellant.*

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13918 *vs.*  
LOUIS DARLAK,  
*Defendant-Appellant.*

Appeals from the  
United States Dis-  
trict Court for the  
Southern District  
of Illinois, North-  
ern Division.

April 22, 1964

Before SCHNACKENBERG, KNOCH and CASTLE,  
*Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James V. Allegretti, Louis A. Darlak, David Falzone and Frank Lisciandrello, defendants, have severally appealed from judgments on

the verdict of a jury and their sentences to imprisonment in pursuance thereof.

Defendants were tried on an indictment charging in count I that they and Joseph Lisciandrello and Gerald Covelli conspired to possess goods which they knew were stolen from an interstate shipment, in violation of 18 U. S. C. A. § 371. In Count II they were charged with possession of Old Sunnybrook whiskey stolen in interstate commerce, and known to have been stolen, in violation of 18 U. S. C. A. §§ 2 and 659.

Although the indictment was returned in the district court for the Northern District of Illinois, Eastern Division, it was transferred to the district court for the Southern District of Illinois, Northern Division, for trial.

Defendant Joseph Lisciandrello, who suffered illness during the trial, was granted a mistrial.

The trial started on March 28, 1962. Ending on April 12, 1962, the jury heard the testimony of 20 government witnesses, as the court reserved its rulings upon repeated objections made by defense counsel to parts of the testimony, relating to acts, conversations and statements made by one or more of the defendants, out of the presence of the other defendants.

The district court, on April 12, 1962, spoke directly to the jury and said:

"Ladies and gentlemen, will you please give me your attention:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

"Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

*"Justice is done when the demands of the law are satisfied whenever a verdict is rendered in accordance with the proof made by all of the evidence to the satisfaction of the jury. \* \* \**

*"The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions." (Emphasis added.)*

Relative to the allocation of functions between the judge and the jury, the jury was told at the outset of the charge that it was the judge of the factual issues, of the credibility of the witnesses and the weight of the evidence. Finally, the charge was concluded with the following instructions:

"Ladies and gentlemen, at the beginning of this charge, I advised you that the Court determines what the law is, but that you, the jury, must determine the fact questions presented by the indictment and the defendants' pleas of not guilty. It is important that you accept the law as given to you by the Court in this charge. It is equally important that you decide all questions of fact upon your appraisal of the credibility of the witnesses and the weight to be accorded to the evidence and that your appraisal of the weight and credibility of the evidence be not influenced by any expression of opinion by the Court upon those matters.

"From time to time as this trial has progressed, it has been my duty as judge to rule upon objections and to decide questions related to the admissibility of evidence. In the course of the trial I have made certain statements and comments to counsel from time to time. No statement or comment by me in either of those instances was intended as an expression of an opinion by this court as to the credibility of any witness or

did exist, you should next determine whether or not the accused knowingly and willfully became a member of the conspiracy. \* \* \*

"Before a jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. \* \* \*

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

"If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement given."

At another point in his charge, the court told the jury:

"If the accused be proved guilty beyond a reasonable doubt, say so. If not proved guilty beyond a reasonable doubt, say so.

"I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants. [Emphasis supplied].

"At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.

"I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

"Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time."

Thereupon all defense counsel joined in a motion for a mistrial, on the ground that the court had invaded the province of the jury. That motion was denied. Thereupon the government rested its case, and the evidence in defense was received.

1. It is undisputed that the government had the burden of submitting to the jury sufficient evidence showing beyond a reasonable doubt that the conspiracy charged in count I existed and that defendants were members thereof. The court accordingly instructed the jury as to its duty in this respect. He also defined the term "conspiracy", as set forth in 18 U. S. C. A. § 371. The court characterized a conspiracy as "a kind of 'partnership in criminal purposes' in which each member becomes the agent of every other member."

Faced with the duty of deciding whether a conspiracy had been proved by the evidence, the jury was aware that the court had told it that the government had "shown to the satisfaction of the Court that a *connection* does exist between each such act, conversation and statement and the several defendants." (Italics supplied.) It was for this reason that the court instructed the jury that it might consider certain evidence, which it had mentioned, against such other defendants who were not then present, as well as against those defendants who were present and participating in such statements and conversations.

Of course the court had the duty to make a ruling upon the objections in question. However, we know of no requirement that the court state to the jury its *reasons* therefor. We have no doubt that a statement by the court that the government had shown to the satisfaction of the court that a connection existed between such relevant evidence and the various defendants charged with conspiracy, undoubtedly had the effect of conveying to the jurors the court's belief that a conspiracy existed, which was the very question which the jury was required to ascertain. We are convinced that a jury would construe the word "connection", used by the court in its oral statement, as closely akin to a conspiracy, as characterized by the court in the foregoing instruction.

In *United States v. Pronger*, 287 F. 2d 498 (1961); where defendant Pronger had appealed from a judgment convicting him on the verdict of a jury on a two-count indictment involving the movement in interstate commerce of a stolen automobile, it was urged at the trial that there was a common scheme or plan between Pronger and a second defendant. The court instructed the jury that it should find whether or not there was any common design or common concert of action between the defendants with regard to

After defining the crime of conspiracy in his charge, the trial judge instructed the jury, in pertinent part:

"If you find from the evidence beyond a reasonable doubt that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete; and it is complete as to every person found by you to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

"A conspiracy is an agreement between two or more persons to violate a law of the United States.

"In this case, the defendants are charged with having agreed, that is to say conspired, to possess merchandise which had been stolen from interstate commerce, knowing the same to have been stolen from interstate commerce.

"Before you can find any defendant guilty of the offense charged in Count 1 of the indictment, you must first find, beyond a reasonable doubt, that such defendant entered into an agreement with another person; that that agreement addressed itself to the knowing possession of merchandise; that that merchandise was stolen from interstate commerce; and that such defendant knew it so to have been stolen at the time of entering into the agreement.

"If the Government has failed to prove any of the foregoing elements as to any defendant, then you must find such defendant as to whom the Government has failed to make such proof in a fashion that satisfies your mind beyond a reasonable doubt, not guilty.

"In your consideration of the evidence as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that such conspiracy

to evidence of one type or another. Through days this jury had observed the court in its function of determining questions of admissibility of evidence. Thus, the ruling in question is not an isolated incident, but only one of the many rulings upon admissibility which this jury observed and heard. The majority of this court must be little impressed with the efficacy of the jury system in general, and with the intelligence of this jury in particular. For my part, I believe it degrades both to conclude as the majority does, that this jury would mistake the comment in question for the statement of an opinion upon the issue of guilt.

We do not even have to conclude that the comment was not erroneous. If it be assumed to be error, when the comment is viewed in the light of this record it was harmless error.

Judge Mercer's ruling upon the pending objections came at the close of the government's case in chief. Thereafter, the trial continued for several days before the evidence was closed. The extent of the time elapsed between the comment in question and the court's charge to the jury is suggested by the fact that a narrative summary of the evidence for the defendants and the rebuttal evidence by the government fills 138½ pages of the printed appendix. The probable effect of the comment upon the jury must be determined in the light of that fact, and, further, by viewing the comment in its proper context with the court's final charge to the jury.

This trial closed with a charge in detail stating the law which the jury would apply. The point is best illustrated by quoting, verbatim, pertinent parts of that charge.

the charges made and that the jury should determine, from evidence, whether or not the defendants were guilty of the charges. In referring to certain remarks of the court, we said, at 500:

"In a case such as this a defendant cannot be bound by the acts or declarations of another defendant until the common design or common concert of action between the two defendants and their participation have been established. *Glasser v. United States*, 315 U.S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680; *United States v. United States Gypsum Co.*, D.C., 67 F. Supp. 397, 451; *May v. United States*, 84 U.S. App. D.C. 223, 175 F.2d 994, 1008.

"Whether intentional or not, we believe that the court's remarks had the effect of telling the jury that the government had proved that the common design or common concert of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350."

We reversed as to defendant Pronger and remanded for a new trial.

In the case at bar, in attempting to justify the statement by the district court that the government had shown to the court's satisfaction that a connection existed between the evidence to which the court referred and the various defendants, government counsel rely on *United States v. Bernard*, 287 F.2d 715 (1961). However, at 720, it appears that the district court's statement to the jury not only was different from that used in the case at bar, but was properly limited so as not to convey to the jury the opinion of the court that a common plan or design had been shown to exist.

But the court did instruct that evidence, with certain exceptions, which when received was not to be considered against any defendant to whom the evidence did not pertain, could thereafter be considered as to all defendants if the jury found that there was a common plan or design proved.

We there held that the question of whether there was such a plan or design was properly submitted to the jury.

At no place in *Bernard* did it appear that the district court attempted to give any reason or explanation for its ruling, which was undoubtedly correct. The court simply announced to the jury its ruling admitting the evidence against all defendants, but left to the jury the question of deciding whether a common plan or design was proved beyond a reasonable doubt. We adhere to the opinion written by District Judge Mercer, who sat with us in deciding that case.

We are constrained to hold that, in the case at bar, the expression of the court's reasons did have the effect of suggesting to the jurors that the court believed that a conspiracy existed, and for that reason invaded the province of the jury. This requires a reversal of the judgments and sentences on Count I.

2. In view of our holding in regard to Count I, it becomes necessary to consider the verdict, judgments and sentences, insofar as they pertain to Count II, which charges defendants with possession of whiskey stolen from a shipment in interstate commerce and known by them to have been stolen.

The court instructed the jury that each offense and the evidence applicable thereto should be considered separately. The jury was further instructed, specifically as to Count II, that the essence of the offense there charged "is guilty

principles of law to his ruling. What they do conclude is that Judge Mercer may have conveyed to the jury the idea that the conspiracy was proved because he stated the reason for his ruling that the evidence was admitted as to all of the defendants.

One must read certain parts of the court's comments out of context to find any such implication therein. In pertinent part, Judge Mercer said:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections had been made, I reserved my ruling thereon, upon the government's avowal to connect up such testimony.

"I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants."

So stating, the court then overruled all pending objections and admitted the evidence as to all defendants.

It must be remembered that this jury, during days of trial proceedings, had heard the United States Attorney promise upon many, many occasions that the government would "connect up" testimony then being offered in evidence. In the light of that fact, it seems clear to me that that same jury, hearing the court's reference to "connected up" and "connection" in context, would understand that the comments related only to the question of the admissibility of the evidence, not to an ultimate issue of the case. Furthermore, this was not a one day trial. A narrative summary of the trial proceedings fills 377 printed pages of the appendix. Those pages reveal many, perhaps hundreds, of rulings by the court upon objections

defendants who were not present when the acts were done or the statements made involves a determination by the trial judge that, independently of the statements of others, there is evidence adduced that a conspiracy existed and that the party against whom the evidence is sought to be introduced was a party to the conspiracy. The court must also be satisfied that the act or statement was done or made while the conspiracy existed and that it was in furtherance of the conspiracy. *E.g. Krulwich v. United States*, 336 U.S. 440 (1949); *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Konovsky*, 7 Cir. (1953), 202 F. 2d 721, 727; *Allen v. United States*, 7 Cir. (1924), 4 F. 2d 688, 694, rehearing den. (1925). The determination of such facts upon which admissibility depends is the province of the trial judge. *United States v. Dennis*, 2 Cir. (1950), 183 F. 2d 201, 230-231, affirmed 341 U.S. 494; *Carbo v. United States*, 9 Cir. (1963), 314 F. 2d 718, 737.

This trial was no exception. Repeatedly, during the presentation of the government's case, evidence of acts and statements by one or more of the alleged conspirators<sup>1</sup> was presented. Objections were made by all defendants not shown to have participated in such acts or statements. Upon the government's avowal that the tendered evidence would be "connected up" Judge Mercer reserved his ruling upon such objections. By the close of the government's case, there remained pending a great number of such objections upon which the court's ruling was reserved. Upon a motion by the government, Judge Mercer overruled all pending objections and admitted the evidence as to all of the defendants.

The majority of the court does not hold that that ruling was error, or that the trial judge failed to apply correct

<sup>1</sup> The appellants and Joseph Lisciandrello who was not then on trial.

knowledge on the part of the accused that the goods were stolen". The jury was correctly told:

" \* \* \* The crime as alleged in Count II consists of possessing it knowing said goods to have been stolen, and you cannot find the defendant guilty of Count II of this indictment unless you believe beyond a reasonable doubt that such defendants knew the goods were stolen, but it is not necessary to warrant a conviction under Count II that the defendant knew the goods were stolen from an interstate shipment. They must indeed have been stolen from an interstate shipment of freight, but it is sufficient guilty knowledge if he knows they were stolen."

To us it is apparent that the government had the burden of proving that each of the four defendants on trial knew that the goods were stolen. The burden of proof beyond a reasonable doubt, of course, rested upon the government, but, as to Count II, the government's case did not rely upon the existence of a conspiracy, as charged in Count I. In this situation the difficult task placed upon the jury in its consideration of the evidence was to separate those parts which were admitted under the conspiracy count, from any evidence tending to prove the charge in Count II.

Considering the length of the trial, the number of witnesses and the difficulties inherent in making this separation in their minds, it is our opinion that laymen jurors would have become so confused as to be unable to perform their function effectively. The error in the court's remarks to the jury could not practically have been confined in the juror's minds to Count I when the jury was also considering the evidence insofar as applicable *only* to Count II. Thus we are required to reverse the judgments and sentences on Count II.

We find it appropriate to make these remarks, in view of the fact that we have contemplated the possibility of

affirming the convictions on the basis of the verdict on Count II only.

3. In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendants' contention to the contrary.

4. Defendants have also alleged and assigned as error the admission of irrelevant, incompetent and prejudicial evidence, improper limiting of cross examination, misconduct of government counsel, a denial of defendants' rights under 18 U. S. C. A. § 3500, a failure of the district court to examine the grand jury minutes of the testimony of witness Olshon in the circumstances, and errors by the court in the giving, and failure to give, certain instructions.

Inasmuch as we shall direct a new trial of this case, if is unnecessary at this time to rule upon these alleged errors. There is no reason to believe that, if errors in these respects were in fact committed, they will be repeated upon another trial.

For all of these reasons, the judgments and sentences from which these appeals were taken are reversed and this case is remanded for a new trial.

REVERSED AND REMANDED.

Nos. 13915-18

CASTLE, *Circuit Judge*, specially concurring. I agree with Judge Schnackenberg's resolution of the issue he finds dispositive of the appeals. The concern so vigorously expressed by our brother, Judge Knoch, appears to overlook that *the merits of the jury system can be preserved and protected only by permitting it to operate without interference by the trial court*. Praise of the system does not serve to overcome the departure therefrom evidenced by the record before us. It is essential to the proper preservation and operation of the jury system that the court not invade the province reserved to the jury—either directly or indirectly. It is unfortunate that the error occurred. That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks. And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the "feeling of collective culpability for a finding of individual guilt." Cf. *United States v. Bufalino*, 2 Cir. 285 F.2d 408, 417.

Nos. 13915-18.

KNOCH, *Circuit Judge* (dissenting): I cannot agree with the majority opinion and decision, and I therefore dissent. I am convinced that there is no substantial basis for reversal of these judgments as to count I of the indictment and no basis whatsoever for reversal of the judgments entered upon count 2 thereof.

A conspiracy trial inevitably presents the perplexing question as to the admissibility of evidence of acts and statements done or made by one or more of the defendants, but without the participation of all of the other defendants. The rule for the admission of such evidence against

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FILED

FEB 20 1965

JOHN F. DAVIS, CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1964.

**No. 924**

JAMES ALLEGRETTI,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.

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THE GUTHMOR-WARREN PRINTING COMPANY, CHICAGO

15-38700-268

## UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Thursday, January 21, 1965

Before

Hon. JOHN S. HASTINGS, *Chief Judge*Hon. F. RYAN DUFFY, *Circuit Judge*Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*Hon. WIN G. KNOCH, *Circuit Judge*Hon. LATHAM CASTLE, *Circuit Judge*Hon. ROGER J. KILEY, *Circuit Judge*Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA,	} Appeals from the
<i>Plaintiff-Appellee,</i>	
No. 13915, 13916,	
13917, 13918 vs.	
JAMES ALLEGRETTI,	
DAVID FALZONE,	
FRANK LISCIANDRELLO and	
LOUIS DARLAK,	
<i>Defendants-Appellants.</i>	
	trict Court for the
	Southern District
	of Illinois, North-
	ern Division.

It is HEREBY ORDERED by the Court sitting *en banc* that the petitions for rehearing filed in the above-captioned appeals be, and the same are hereby DENIED.

(Judge Schnackenberg voted to grant petitions for rehearing).

## UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, December 22, 1964

Before

Hon. JOHN S. HASTINGS, *Chief Judge*Hon. F. RYAN DUFFY, *Circuit Judge*Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*Hon. WIN G. KNOCH, *Circuit Judge*Hon. LATHAM CASTLE, *Circuit Judge*Hon. ROGER J. KILEY, *Circuit Judge*Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

No. 13915, 13916,

13917, 13918 vs.

JAMES ALLEGRETTI,

DAVID FALZONE,

FRANK LISCIANDRELLO and

LOUIS DARLAK,

*Defendants-Appellants.*Appeals from the  
United States Dis-  
trict Court for the  
Southern District  
of Illinois, North-  
ern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Northern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

quate instructions in interpreting that testimony with respect to the basic issues of the innocence or guilt of the defendants.

We have reviewed all other points raised by the defendants. After due consideration, we find that none operates to alter our conviction that the judgment of the District Court must be affirmed.

AFFIRMED.

SCHNACKENBERG, *Circuit Judge*, partly concurring and partly dissenting.

I approve and concur in Judge Knoch's opinion insofar as it is not inconsistent with the majority opinion of this court filed on April 22, 1964.

The comment of a judge who concurred is pertinent:

"\* \* \* And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the 'feeling of collective culpability for a finding of individual guilt.'"

I would reverse the district court in this case and remand it for a new trial.

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#### STATUTES AND RULE.

##### Rule 52(b) of the Federal Rules of Criminal Procedure:

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was unduly limited to the prejudice of the defendants. In every such instance cited by the defendants, the Trial Judge sustained objections to the questions as beyond the scope of the direct examination. The defendants concede the traditionally wide latitude given to a trial judge in controlling cross-examination, but argue that the principle has here been expanded to keep relevant facts from the jury concerning possible collaboration between Lou Fushanis, one of his employees, and Gerald Covelli, sought to be introduced by way of cross-examination. Our study of the matter leads us to the opposite view that the Trial Judge did not abuse his authority in this respect. One of the explanations given for the effort to introduce the evidence sought to be elicited by way of cross-examination is that the defense could hardly be expected to call Gerald Covelli as its witness. The difficulties inherent in trial tactics cannot be permitted to dilute the authority of a Trial Judge to control the trial. We find no error here.

Contrary to defendants' contention, the Trial Judge did instruct the jury that to find defendants guilty they must find them to have known that the merchandise involved was stolen from interstate commerce. It was not necessary to give repetitious instructions tendered by the defense.

The Trial Court also instructed the jury regarding the definition of an accomplice and the caution to be exercised in weighing his evidence. Whether Lou Fushanis was or was not an accomplice or co-conspirator was an issue of fact which was presented to the jury by a conflict in the evidence. It was not error for the District Judge to refuse to underline the testimony of one of the witnesses and his inferences respecting this issue. If the jury concluded Lou Fushanis was an accomplice, then they had been told how to treat his testimony, and they had ade-

those languages because he proposed ultimately to leave the country and live elsewhere. He then added, not responsively, "I could never live peacefully in this country, because there is a price on my head now." Later Robert Westerhausen testified that Gerald Covelli had admitted to him that he intended to go to Brazil to steal diamonds and that he was studying Spanish for that purpose. We do not consider this, or the other similar actions by the Trial Judge, as bases for reversal.

It is further contended that the defendants were denied their rights under 18 U. S. C. § 3500 (Jencks Act) with respect to the witness Max Olshon. It is apparent from our own close study in camera of the documents in question, which included both direct statements of witnesses and reports of government agents, which the Trial Judge examined in camera, that he did not, as feared by defense counsel, limit the word "statements" as used in the statute to mean only such statements as the witness had himself set down on paper. We find no error in this regard.

Max Olshon testified to a conversation with David Falcone on March 18, 1959. The prior statement of Max Olshon which was produced did not refer to this conversation. Objection was sustained to the question whether he had told the Grand Jury about it. The Trial Court denied a motion for production of the Grand Jury transcript of his testimony to ascertain whether he had or had not mentioned this conversation. No such particularized need was shown for such production as to outweigh the traditional maintenance of secrecy surrounding grand jury proceedings. It was not error to deny the motion. *U. S. v. Magin*, 7 Cir., 1960, 280 F. 2d 74, 79; *U. S. v. Nasser*, 7 Cir., 1962, 301 F. 2d 243, 245; and cases there cited.

We have given particularly close consideration to the assertion that cross-examination of government witnesses

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1964.

No. \_\_\_\_\_

JAMES ALLEGRETTI,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

### PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your Petitioner, James Allegretti, respectfully prays that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit, the Court sitting en banc on a Petition for Rehearing, in the case entitled *United States of America v. James Allegretti, et al.*, Defendants-Appellants, No. 13915-16-17-18.

### JUDGMENTS AND OPINIONS OF THE COURT BELOW.

In this cause, on appeal to the Seventh Circuit, a decision was issued April 22, 1964, reversing the decision of the United States District Court for the Southern District of Illinois, Northern Division, one Judge dissenting. On August 3, 1964, it was ordered by the United States Court of Appeals for the Seventh Circuit that the Petition of the United States of America, Plaintiff-Appellee, theretofore filed for a rehearing en banc in the case be granted, and it was further ordered that the rehearing would be heard by the Court sitting en banc on the Petition of the United States and the Answers filed by this Petitioner and by a co-defendant, David Fálzone. On December 22, 1964, the Court sitting en banc affirmed the judgment of the District Court, one Judge dissenting. A Petition for Rehearing from that decision was denied, one Judge dissenting, on January 21, 1965.

Neither the opinion of April 22 nor December 22, 1964, is reported as yet, but both appear in the printed appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of this record and transmitted herewith.

### JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Southern District of Illinois, Northern Division, was filed on the 22nd day of December, 1964. On January 21, 1965, it was ordered that the Petition for Rehearing be denied. These orders appear in the Appendix hereto. This Petition is filed within thirty days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254-(1).

mother. The Trial Judge sustained objections to this and instructed the jury:

"The jury is instructed and admonished by the Court to pay no attention whatever to the last improper question by the Government."

It is contended that this admonition was insufficient and that a motion for mistrial should have been allowed. Although adjudged restored to sanity, the witness's interest, possible prejudices and accuracy of memory, and factors affecting these, were all proper subjects of cross-examination. The government was entitled to elicit pertinent circumstances affecting his credibility. *U. S. v. Lawinski*, 7 Cir., 1952, 195 F. 2d 1, 7. As the government argues, Mr. Westerhausen's mental history was extremely complex, *U. S. v. Westerhausen*, 7 Cir., 1960, 283 F. 2d 844, 848, including not only loss of memory, but auditory hallucinations. After carefully weighing the matter, we do not agree that this one question, which the Trial Judge held to be improper, and on which the jury were promptly instructed, required a mistrial. Similarly, we find no reversible error in the failure of the prosecution to follow up with affirmative proof its questions to which Mr. Westerhausen gave negative answers.

In several instances, the Trial Judge ordered parts of the testimony stricken although the defendants had moved not to strike but to declare a mistrial. A typical instance was Gerald Covelli's statement that there was a price on his head. The Trial Judge ordered the statement stricken and instructed the jury to disregard it. Gerald Covelli had been asked on cross-examination about having studied Spanish and Italian in Leavenworth and had denied that he proposed to go to Rio de Janeiro to take "off a diamond score." It was proper on redirect to cover the same subject matter. On redirect, Covelli said he was studying

tween David Falzone, Gerald Covelli, and various government agents, including William D. Weatherwax, in the U. S. Attorney's office. During cross-examination of Gerald Covelli reference was made to contradictions between his prior statements and his trial testimony. Gerald Covelli was explaining this on re-direct, pointing out that he had been corrected by David Falzone as to certain dates and places in the course of the above conversation. The corrections and attendant comments made by David Falzone, and described by Gerald Covelli, were incriminatory admissions of David Falzone and were clearly admitted only as evidence against Falzone. These admissions were corroborated by the testimony of a government agent present at the time who was properly permitted to testify to that effect and to the attendant circumstances, including the questions and comments in answer to which the incriminatory admissions were made.

The testimony of Gerald Covelli was a vital part of the government's case. The defense witness Robert Westerhausen testified that while he and Covelli were prisoners at Leavenworth, Covelli told him in the course of many conversations that he was being paid to implicate his co-defendants, who in fact had nothing to do with the stolen liquor, in order to shield the real culprits.

The cross-examination of Mr. Westerhausen brought out the details of his prior long history of mental incapacity, although he had since been judicially determined as restored to sanity. On redirect, Mr. Westerhausen testified to the nature and extent of his prior mental disease and its cure beginning in 1955 with the result, he stated, that his memory began to improve. On re-cross, Mr. Westerhausen said again that his memory had begun to improve about 1955. The government counsel then asked whether Mr. Westerhausen now recalled killing his step-

### QUESTIONS PRESENTED.

1. Does a statement to the jury by the trial judge that the government has shown to his satisfaction that a connection existed between the defendants charged as co-conspirators and the acts, conversations and statements, made out of their presence effectively convey to the jury the Court's brief that a conspiracy existed?

2. Where an erroneous rule of law on conspiracy as follows is adopted by a seven judge en banc Court of Appeals:

"The rule for the admission of such evidence against defendants who were not present when the acts were done or the statements made involves a *determination by the trial judge* that, independently of the statements of others, there is evidence adduced that a conspiracy existed and that the party against whom the evidence is sought to be introduced was a party to the conspiracy. The Court *must also be satisfied* that the act or statement was done or made while the conspiracy existed and that it was done in furtherance of the conspiracy." (App. 10a.)

has not the necessity for this Court to exercise its supervisory and corrective powers arisen, so as to prevent injustice in the case at bar and in future prosecutions in that Circuit where the opinion and rule must be regarded as the law of the Seventh Circuit?

3. Was it appropriate for a Court of Appeals en banc to reverse a proper decision in the case at bar by a regular panel of judges who had based their judgment and opinion on a proper prior decision of long standing (*United States v. Pronger*, 7 Cir., 287 F. 2d 498)?

4. Does not such action indicate that this Court should consider and review the confused status of the questions of when, whether and how trial judges should rule on ad-

missibility of evidence of conspiracy without invading the province of and swaying the jury by expression of its satisfaction that connection between parties and acts and conversations exists?

5. When it has been shown with fair and demonstrable assurance that a verdict was induced and the judgment swayed by error, can that admitted error be held to be harmless?

6. On cross-examination of the main witness for the defense, is the eliciting of testimony concerning attendance at a grade school for incorrigibles, juvenile offenses resulting in being placed in reformatories and training homes a valid subject of examination aimed toward impeachment?

7. On cross-examination of the main witness for the defense, is the question "Do you now recall killing your stepmother?", the kind of question that the jury put out of their minds simply by being told to do so?

8. May a government agent's narrative of a statement made by a co-defendant two years after the conclusion of the conspiracy be admitted against his charged co-conspirators?

9. On a charge of conspiracy to possess stolen whiskey, and after the discovery of some of the whiskey and the arrest of one defendant, was the admission of evidence regarding "squashing the beef" and "fixing the case", absent pre-arranged assurance of continuous aid, prejudicial error?

#### STATEMENT OF THE CASE.

This case involved an appeal from a judgment of conviction on two counts of a two count indictment charging this Petitioner and his co-defendants, Gerald Covelli, David Falzone, Frank and Joseph Lisciandrello and Louis Darlak, in Count I, with a conspiracy to unlawfully possess certain

Allegretti would "straighten out the whole case." Gerald Covelli testified that he and David Falzone then engaged in efforts to raise the money requested by James Allegretti for that purpose. There was evidence that David Falzone continued to participate in the conspiracy. *U.S. v. Agueci*, 2 Cir., 1962, 310 F. 2d 817, 839, and cases there cited. It was not necessary for the government to prove what, if anything, James Allegretti actually did to "straighten out the case," and continue the conspiracy. There was evidence that he asked for money that, after David Falzone's arrest and release on bond, Falzone and Gerald Covelli did raise such sums which were turned over to James Allegretti to be used for that purpose.

David Falzone testified that he had seen Agent Weatherwax casually at a motel in April, 1962, had started a conversation with him, and that Agent Weatherwax, on hearing that Falzone proposed to testify at the trial, had said, "Don't be a fool, we will murder you on that stand." On cross-examination, the government attempted in vain to elicit certain testimony of further conversation with Agent Weatherwax respecting David Falzone's reasons for testifying as he did. Under the circumstances, it was proper rebuttal for Agent Weatherwax to testify to those further conversations and to incriminating admissions made by David Falzone in the course of such conversations.

We have scrutinized all the other examples of such evidence, the admission of which is characterized by appellants as reversible error, and must conclude that the position of the defense on this point is not well founded.

It is contended that post conspiracy declarations of one co-defendant, although admitted as to him alone (a matter on which the jury was instructed) were elicited with intent to prejudice the other defendants. Some of these declarations were made in the course of conversation be-

on some of the cafes involved, or making false exculpatory statements to the government agents.

There were sharp conflicts in the testimony and in numerous instances the jury would have to resolve issues of credibility. Viewed in the light most favorable to the government, the evidence supports the convictions. *Glasser v. U. S.*, 1942, 315 U. S. 60, 80.

We do not adopt the majority opinion of April 22, 1964, with respect to the comments made by the Trial Judge in connection with his ruling on the admissibility of acts and statements of certain defendants in evidence against other defendants. It was on the basis of those comments that the majority, in the opinion of April 22, 1964, based its reversal of the convictions here appealed. We adopt instead the dissenting opinion to the effect that the statements of the Trial Judge did not constitute reversible error. \_\_\_\_\_ F. 2d \_\_\_\_\_, beginning at page \_\_\_\_\_

The defendants contend that statements made by alleged co-conspirator defendant David Falzone after his arrest were improperly admitted in evidence against other defendants. Their theory is that with the arrest of David Falzone, and the raids made the same day on some of the cafes where the stolen whiskey was stored, the conspiracy to possess liquor stolen from interstate commerce had come to rest. The evidence in the record supports a contrary holding that David Falzone's arrest did not terminate the conspiracy. Gerald Covelli testified to seeing some of the stolen whiskey in the possession of fellow conspirators two weeks after the earlier raids on some of the cafes. Even while in the custody of the Federal Bureau of Investigation, David Falzone was still issuing instructions for disposition of a part of the stolen liquor. Max Olshon testified that when released on bond, David Falzone stated that he was not unduly worried because Jimmy,

whiskey, taken from an interstate shipment in violation of Section 371 of Title 18 U. S. C. The second count charged possession of the same goods, which were 34 cases of 48 half pint bottles of Old Sunny Brook Whiskey, in violation of Sections 659 and 2 of Title 18, United States Code. The case was tried to the Court sitting with a jury, and on a verdict of guilty, the judge entered a judgment of conviction on both counts. This petitioner was sentenced to the custody of the Attorney General for a period of five years and fined the sum of \$3,000 on Count I, and for a period of 7 years on Count II, said sentence on Count II to run concurrently with the sentence on Count I. It was from this conviction and sentence that an appeal was taken to the United States Court of Appeals for the Seventh Circuit.

The errors complained of included insufficiency of evidence; the usurpation by the trial judge of the jury function of determining the existence of the conspiracy; the admission of irrelevant, incompetent, and prejudicial evidence; the improper limitation of cross-examination; misconduct of government counsel, the denial of defendants' rights under 18 U. S. C. Section 3500; a failure of the District Court to examine the Grand Jury minutes of the testimony of a witness and errors in the giving and the failure to give certain instructions.

After briefs were filed, argument was had before a panel of three Circuit Court Judges. The cause was reversed on the ground that the trial judge had usurped the fact determination function of the jury. Error was found in an instruction given at the conclusion of the government's case, which was set forth verbatim in the April 22, 1964, decision as follows:

"The district court, on April 12, 1962, spoke directly to the jury and said:

'Ladies and gentlemen, will you please give me your attention:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

'I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants. (Emphasis supplied.)

'At this time, therefore, I overrule each objection as to which my ruling was reversed from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants, whether or not each was present when such acts were done, such conversations were had or such statements were made.

'I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

'Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time.' (App. 2a-3a.)

A second member of the panel, specially concurred, stating as follows:

"That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks." (App. 9a.)

nature of these proceedings is sufficiently set out to make repetition here unnecessary.

We have enjoyed the benefit of oral argument on such re-consideration together with the record and the briefs of counsel.

On reconsideration, this Court adopts the majority opinion handed down April 22, 1964, insofar as that opinion concluded that the evidence was sufficient to convict all the defendants herein on both counts of the indictment of (1) conspiracy to possess whiskey stolen from interstate commerce knowing such whiskey was stolen from interstate commerce, and (2) as to each defendant, of knowingly possessing the stolen whiskey.\*

The trial was a long one. The conspiracy disclosed by the evidence was complicated. There was ample proof that the whiskey in question was stolen from an interstate shipment and abundant circumstantial evidence from which the jury could have concluded that each defendant must have known that the whiskey was stolen. The record shows that all of the defendants contributed to carrying out the object of the common conspiracy to possess the stolen whiskey. We deem it unnecessary to narrate the details of their activities. The record discloses that each engaged in one or more of such acts as storing the whiskey, directing or carrying out its distribution to various cafes, operating those cafes, stowing the whiskey there, and, in some cases, transferring it to other containers, raising funds to enable the conspiracy to continue after government agents had arrested one of the conspirators and after raids

\* In the opinion of April 22, 1964, ... F. 2d, ..., at page ..., the Court stated: "In addition to the matters which we have already discussed, we deem it appropriate, to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendants' contention to the contrary."

IN THE UNITED STATES COURT OF APPEALS  
For the Seventh Circuit.

Nos. 13915-18 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13915 vs.  
JAMES ALLEGRETTI,  
*Defendant-Appellant.*  
UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13916 vs.  
DAVID FALZONE,  
*Defendant-Appellant.*  
UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13917 vs.  
FRANK LISCIANDRELLO,  
*Defendant-Appellant.*  
UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
No. 13918 vs.  
LOUIS DARLAK,  
*Defendant-Appellant.*

Appeals from the  
United States Dis-  
trict Court for the  
Southern District  
of Illinois, North-  
ern Division.

December 22, 1964

Before HASTINGS, Chief Judge, and DUFFY, SCHNACKEN-  
BERG, KNOCH, CASTLE, KILEY and SWYGERT, Circuit Judges,  
en banc.

KNOCH, Circuit Judge. This matter came before the  
Court for reconsideration of its opinion previously ren-  
dered on April 22, 1964, \_\_\_\_\_ F. 2d \_\_\_\_\_, in which the

A dissent was written by the third member of the panel, wherein the dissenting judge found it unnecessary to determine whether or not error had been committed in giving the instruction, but expressed satisfaction that if error had been committed it was not prejudicial, on the apparent ground that a time lag had intervened between the instruction found offensive by the majority of the Court and the submission of the final charge to the jury. The essence of the dissent is as follows:

"We do not even have to conclude that the comment was not erroneous. If it be assumed to be error, when the comment is viewed in the light of this record it was harmless error.

"Judge Mercer's ruling upon the pending objections came at the close of the government's case in chief. Thereafter, the trial continued for several days before the evidence was closed. The extent of the time elapsed between the comment in question and the court's charge to the jury is suggested by the fact that a narrative summary of the evidence for the defendants and the rebuttal evidence by the government fills 138½ pages of the printed appendix. The probable effect of the comment upon the jury must be determined in the light of that fact, and, further by viewing the comment in its proper context with the court's final charge to the jury." (App. 12a.)

Since the majority of the Court found reversible error, it did not find it necessary, except that it did find sufficiency of evidence, to rule on the other claims of error asserted.

On May 25, 1964, the Government Petitioned for Rehearing *en banc* on the ground that the Court of Appeals for the Seventh Circuit had ruled inconsistently in *United States v. Pronger*, 287 F. 2d 498 (the case principally relied upon by the defendants on the appeal on this point), and *United States v. Bernard*, 287 F. 2d 713, and, thus, there existed conflicting opinions among the several panels of the same Court of Appeals.

Resistance by this Petitioner to a rehearing *en banc* was unavailing, and the Court ordered the entire case reheard by the entire court sitting on August 3, 1964.

Upon the rehearing *en banc* the Court of Appeals adopted the view expressed in the first opinion that there was sufficient evidence adduced to convict. It adopted the decision of the dissenting judge from the April 22 opinion, and found no prejudicial error in the assignments of error urged, but not reached in the April 22 decision.

On December 22, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Southern District of Illinois, Northern Division, and denied this Petitioner's petition for rehearing on January 21st.

#### STATEMENT OF FACTS.

On or about December 26, 1957, there was placed in truck trailer No. 775 of the Indianapolis Forwarding Company at Louisville, Kentucky, for delivery at Gold Seal Liquors, Chicago, Illinois, certain "Old Sunnybrook" whiskey, in one-half pints, contained in cardboard boxes, each box bearing a serial number, which said serial numbers ran consecutively from J588898 through J589772. The said trailer, locked and sealed, was, on December 27, 1957, driven from Louisville, Kentucky to Chicago, Illinois, and parked, unopened and sealed, at the Indianapolis Forwarding Dock, Chicago, awaiting delivery to Gold Seal. On December 31, 1957, truck trailer 775 was discovered to be missing from its stall at Indianapolis Forwarding. On January 2, 1958, said trailer 775 was found in a vacant lot on the Southwest side of Chicago, with the seal broken and the trailer empty (App. 491-495).

As the result of simultaneous raids on the afternoon of

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago, Illinois, 60610.

Monday, August 3, 1964.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.

UNITED STATES OF AMERICA,	} Appeals from the
Plaintiff-Appellee,	
No. 13915, 16,	
17, 18 vs.	
JAMES ALLEGRETTI, DAVID FALZONE,	
FRANK LISCIANDRELLO, LOUIS DAR-	} United States Dis-
LAK,	
Defendants-Appellants.	trict Court for the
	Southern District
	of Illinois, North-
	ern Division.

In accordance with the unanimous views of the members of the Court, It Is ORDERED that the petition of the United States of America, plaintiff-appellee, for a rehearing *en banc* in this case be, and the same is hereby granted, and said rehearing shall be heard by the Court *en banc* on said petition and the answers thereto filed by James Allegretti and David Falzone, defendants-appellants.

and through that process, render their verdict. I am not willing to presume that any member of this jury was so lacking in intelligence and understanding that he or she was unable to perform his duty. Without making such a presumption, I can find no support for the decision which the majority of this court has reached. I have a strong respect for the fundamental right of *every* accused person to a *fair* trial. I have an equally strong respect for the requirement of an orderly judicial process at both the trial court and appellate level. It is my opinion that we will further neither of those causes if these judgments are reversed. Fair trial must, of necessity, not mean "perfect" trial. It must successfully protect the rights of each individual accused, and, at the same time, protect society in general. Only thus will it preserve that high respect for law and order (which is sadly lacking in many areas of our national existence today) without which our form of life and government would soon perish.

In the absence of a single iota of proof to the contrary, I confidently believe this jury conscientiously performed the duty which they were empanelled and sworn to perform. Upon this record, each of the defendants has had a fair trial. The evidence of record fully supports the jury's verdict upon each count of the indictment and against each of the defendants. I cannot agree we should sift the record with a fine sieve to find a slight imperfection which could not have enured to the prejudice of any of the defendants for reversal of these judgments.

I would affirm the judgment upon each of these appeals.

March 17, 1958 of the Cafe Continental and the Silver Dome, respectively a night club and a cocktail lounge, both operated principally by the co-defendant Gerald Covelli, some of the stolen whiskey was recovered (App. 138-144).

Covelli, who was the government's chief witness, testified to the delivery of more of the stolen whiskey to the Flame Tavern, operated by Joseph Lisciandrello, Ciro's, where this petitioner was employed and the Front Page, in which from the evidence it could be inferred this petitioner was interested (App. 141, 143, 228-229). These were all taverns. None of the whiskey was found on these premises.

The further evidence against this petitioner was that he directed where the whiskey was to be stored in Ciro's (App. 141), upon which occasion he or his brother, Benny asked Darlak, Covelli's companion, to bring 10 or 20 cases to the Front Page (App. 228-229).

The bulk of the evidence against petitioner, testified to over and over again by Covelli (App. 147-154; 211; 226-227), concerned this petitioner's solicitation of \$2,500 to "fix" the case, or to "squash the beef". This testimony was admitted on the ground that the transaction occurred within the time period alleged in the indictment, though after the raids described above and the arrest of one of the charged co-defendants.

The defense consisted in part of the testimony of the co-defendant Falzone, who basically attempted to exonerate himself and put the responsibility on Covelli (App. 299-325). His cross-examination consisted principally in denying he had to lie because he was in deathly fear of his co-defendants, and principally this petitioner, and denying that he had no choice but to testify "and get Jimmy Allegretti off". (App. 330-339).

Robert Westerhausen was the principal defense witness. A prison-mate of Covelli, his testimony was, in essence,

that Covelli had told him he had been feeding the F. B. I. "stuff" about the stolen whiskey, telling them anything he thought they wanted to hear, that the persons he accused, the defendants here, had nothing to do with it and that he was shielding the real culprits (App. 345-350). His cross-examination by the government brought out his former psychiatric problems, the time he spent in juvenile homes and reformatories, his bullet wound, and his acquittal of a robbery charge because of insanity (App. 350-351). After the defense attempted to rehabilitate the witness by showing his restoration to sanity and his restoration of memory (App. 354-356), his re-cross-examination consisted of the question

"Do you recall killing your stepmother?" (App. 356).

On objection and motion for mistrial, the jury was instructed to pay no attention to that "improper" question (App. 357).

#### REASONS FOR GRANTING WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

I. This case stands for the proposition that the measure of the quantity and quality of the government's proof of conspiracy is the satisfaction of the presiding judge. This Court should exercise its supervisory power in maintaining the jury function secured by the Constitution; and restoring some semblance of order to the law to be applied in this Circuit.

II. One appeal judge of a three-judge panel found the trial judge's statement that he was satisfied a "connection" existed among the charged co-conspirators was a usurpation of the jury function and a second judge found that the statement invited a substitution of the feeling of collective

entered by each of the defendants placed the whole burden upon the government to prove them guilty beyond a reasonable doubt.

Finally, the jury was charged as follows:

"It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined upon the evidence which has been admitted against him.

"As you have noted, a separate crime or offense is charged against each of the defendants in each count of the indictment. Each offense and the evidence applicable thereto should be considered separately. The fact that you find some or all of the accused guilty or not guilty of the offenses charged should not control your verdict with respect to any other offense charged."

The charge given was complete and adequate. Upon this record, the jury can have ignored the conspiracy evidence and, yet have found beyond all reasonable doubt that the whiskey was stolen from an interstate shipment of freight, that each of the defendants had possession of all, or some, of the whiskey and that each of them knew that the whiskey had been stolen. I agree with the majority of the court that the evidence of record is sufficient to prove every essential element of the offense and the guilt of each of the defendants.

The jury system assumes that the persons selected after proper voir dire to serve as jurors are equipped with a sufficient degree of intelligence and literacy to understand and comprehend the English language. The system also presumes that jurors can take the law as given to them by the courts, apply the law to the evidence before them,

a conflict in the charge itself which was inclined to confuse the jury.

By contrast, the comment here involved was made at the close of the government's case, with several days of trial, as summarized in almost 140 printed pages of narrative in the appendix, intervening between the comment itself and the final charge of the jury. The error, if any, was harmless, when viewed in its context in this record.

The majority opinion and decision reversing these judgments as to the substantive count of the indictment, count 2, is even more devoid of logic than is the majority opinion relative to count 1. The only reason assigned for reversal as to count 2 is that the difficulty of distinguishing the conspiracy evidence from the evidence relevant to count 2 rendered this lay jury unable to perform its function effectively. It is said that reversal must follow despite the fact that the evidence of record is sufficient to support the jury's verdict finding all of the defendants guilty of the offense charged in count 2.

To me the premises contain an inherent contradiction in the light of the record. This jury was not sent out to deliberate blindly without adequate instruction as to the law applicable to count 2. Count 2 charged the possession of liquor which had been stolen from an interstate shipment of freight in violation of 18 U. S. C. 659. In his charge, Judge Mercer defined the crime charged by an accurate summary of the statutory language. A paragraph of the charge defined possession. All essential elements of the crime were stated with particularity. The jury was advised that it must find that the government had proved each of those essential elements beyond a reasonable doubt before it could find any of the defendants guilty. The guilty knowledge required by the statute was fully and concisely defined. The jury was told that the plea of not guilty

culpability for a finding of individual guilt. After a decision directing reversal, the Court of Appeals, sitting *en banc* at the behest of the government reversed the panel and affirmed the conviction. In so doing it departed from the norm established by this Court, that it is only when one can say with fair assurance that the verdict was not substantially swayed by the error, that error was harmless. A plain departure from that established norm calls for an exercise of this Court's power of supervision.

III. Condoning impeachment by eliciting information of juvenile incorrigibility and confinement in a reformatory is in direct conflict with the decision of the Court of Appeals for the District of Columbia.

IV. The holding of this Court that a charge of matricide is harmless is contrary to common sense.

V. The ruling in this case sanctioning the admission against all defendants of testimony of an F. B. I. agent in which he described certain statements made to him by an alleged co-conspirator two years after the conspiracy, charged is in direct conflict with this Court's decision in *Krulevitch v. U. S.*, 336 U. S. 440 and with decisions in the Tenth, Fifth and Sixth Circuits.

VI. The ruling in this case sanctioning the admission of evidence regarding "squashing the beef" and "fixing the case" on a charge of conspiracy to possess stolen whiskey is in conflict with applicable decisions of this Court and of the Second, as well as this, the Seventh Circuits.

## I.

The applicable law to declarations of co-conspirators is hopelessly confused in this circuit due to this decision. The basis upon which the Government sued for a rehearing *en banc* in this case was an assertion of inconsistency

between *United States v. Pronger*, 287 F. 2d 498 (upon the authority of which case this conviction was reversed in the first instance by the United States Court of Appeals), and *United States v. Bernard*, 287 F. 2d 715. The decision in *Pronger* was handed down on March 1, 1961, the decision in *Bernard* was handed down on January 26, 1961, with rehearing being denied on April 16, 1961. No claim of inconsistency between the two cases was made until this case appeared and was decided over three years later. The resolution of the claimed inconsistency was obviously not of importance for that period of time. We contend there was no inconsistency, and that the urging of the Government in that regard was prompted by expediency in a case where the accused enjoyed notoriety. The decision of the Court of Appeals for the Seventh Circuit, on the other hand, has provoked a situation where an equivocal direction to the jury, which may have usurped its fact finding function in *Pronger* is held to be reversible error, and a direction to the jury plainly usurping that function in this case is held not reversible.

We consider a demonstration necessary. In *United States v. Bernard*, 287 F. 2d 715, error was assigned on the ground that the defendants were charged with substantive offenses against the Internal Revenue laws. The error complained of was the Court's ruling on "vicarious responsibility" where the laws of conspiracy relative to the statements of co-conspirators outside the presence were applied, amounted to an amendment of the indictment. The complaint was not, as it was in both *Pronger* and in this case, a contention that the Court had invaded the province of the fact finding body.

The trial court, in *United States v. Bernard*, instructed the jury as follows:

proved and that such defendant was found to be a member thereof. The jury was told, explicitly, what was the evidence upon which its verdict must be found. Finally, the District Judge told the jury that he had not by his charge to the jury or in any statement made by him during the course of the trial expressed any opinion upon the issues of fact, the weight of the evidence, or the credibility of the witnesses. One wonders what more a trial judge could have done. For my part, I am sufficiently naive to believe that these jurors were intelligent enough to understand the court's charge.

The zenith of appellate review of trial court decisions is reached when the reviewing court remains mindful of its own function and keeps ever in touch with reason and the realities of the world around it. One of those realities, and a recognized factor of judicial review, is the recognition of the frailties of man. An accused person is entitled to a fair trial, but not to a trial free of all error. *Fed. Rules of Crim. Procedure* 61; *Lutwak v. United States*, 344 U. S. 604 (1953). Were that not the rule, the judgment which could ever be affirmed would be well nigh impossible to achieve. I believe the majority of the court has now abolished that principle by reversing these judgments as to count 1 of this indictment upon an unsubstantial technicality viewed in an attitude separated from reality and oblivious to the context of this record.

The situation here is not at all comparable to that which existed in *United States v. Pronger*, 7 Cir., (1961) 287 F. 2d 498. In *Pronger*, the ruling upon admissibility and the comments found to be objectionable were made just prior to the court's charge to the jury. The sequence was such that those comments, for all practical purposes, were part of the charge. Under those circumstances, this court concluded that the effect of the Judge's comments was either to tell the jury that the conspiracy was proved, or to create

that nothing said by me during the course of the trial should be taken or understood by you as an expression of an opinion by this court upon either the weight or the credibility of the evidence.

"It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury."

The imperative of the issues, as I see them, precludes the need for any apology for the extent of the foregoing quotations. The comment made by the District Judge in his ruling upon the pending objections must be weighed in the light of the whole record, and the charge to the jury in particular. That the majority of this court is unwilling to do. In no other way can I see any foundation for their conclusion that the Judge's statement that evidence was "connected up" burned so hotly in the consciousness of these jurors for days that they were precluded from understanding the court's charge at the close of the case. If that be true, these jurors must still be perplexed at the expenditure of long days hearing evidence related to issues as to which they had already been peremptorily instructed.

In his charge at the close of the evidence, Judge Mercer correctly advised the jury that the jury must decide whether a conspiracy had been proved and whether each of the defendants had joined in that conspiracy. The jury was further told that the acts and statements of others might not be considered as evidence in its determination whether each of the defendants was a member of any conspiracy by them found to exist. It was told, also, that acts and statements of a co-conspirator could be considered as evidence against a defendant who did not participate therein only if the jury was satisfied that a conspiracy had been

"You are to receive all the admitted evidence offered by the government, with the exception of the three specifications that I specifically noted, as having been received against all of the defendants. Thank you." (A. 1816, No. 13868, 7th Circuit.)

In other words, the trial court made a determination that there had been sufficient foundation for the admission of this evidence against all parties. It is noted that the ruling went only to admissibility of evidence. Indeed that was the ruling of the Court of Appeals:

"From our review of the record, it is apparent that we are dealing in this phase of the case with the question of the admissibility of evidence only, . . ." (287 F. 2d at 720.)

The trial court in the *Bernard* case, in its final instructions, clarified the initial rule on admissibility in a manner wholly consistent with this initial ruling, in fact, advert-ing specifically to its earlier ruling on such admissibility:

"Later, near the close of the government's case you were instructed that such evidence, with certain exceptions had been admitted as to all defendants and that you might consider such evidence as pertaining to all defendants.

"If you now find beyond a reasonable doubt from all the evidence in this case that there was a common plan or design to engage in a general course of corporate business transactions of the type shown by the evidence, you may consider all the acts (of each of the individual defendants as evidence pertaining to all).

"On the other hand, if you find from all the evidence that such a common plan or design was not shown beyond a reasonable doubt then you will consider the acts and declarations of each defendant only as to him and not to any other defendant." *United States v. Bernard*, 7 Cir., 287 F. 2d 715, 720.

In *United States v. Pronger*, 287 F. 2d 498, the Court instructed the jury at the time of his ruling on admissi-

ability at the conclusion of the government's case, which instruction was found to be reversible error, as follows:

" \* \* \* during the course of the trial there was testimony as to some conversations which I instructed you should only be considered as to one or the other of the two defendants.

" Likewise, a conversation had by the witness Kadet on August 3, 1959, \* \* \* but in any event at the time that Kadet testified that he talked to Roberts; as you will recall, I limited that testimony of that conversation only as to the defendant Roberts. Now you may consider it as to both defendants.

" The question still is, of course, whether or not you find that there was any common design between these two defendants, with regard to any of the charges that are made in this case. It will be for you to determine, from the evidence, whether or not the defendants are guilty of the charges, beyond a reasonable doubt. But I instruct you that you may consider the limitation that was placed upon the testimony as to these conversations, so far as being limited to one or the other of the defendants as I have indicated is now removed." *United States of America v. Pronger*, 7 Cir., 287 F. 2d 498, 499, 450.

Now, in this case, the Court instructed the jury at the close of the government's case, which instruction was found to be not reversible error as follows:

" From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

" I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each

" Justice is done when the demands of the law are satisfied whenever a verdict is rendered in accordance with the proof made by all of the evidence to the satisfaction of the jury. \* \* \*

" The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions." (Emphasis added.)

Relative to the allocation of functions between the judge and the jury, the jury was told at the outset of the charge that it was the judge of the factual issues, of the credibility of the witnesses and the weight of the evidence. Finally, the charge was concluded with the following instructions:

" Ladies and gentlemen, at the beginning of this charge, I advised you that the Court determines what the law is, but that you, the jury, must determine the fact questions presented by the indictment and the defendants' pleas of not guilty. It is important that you accept the law as given to you by the Court in this charge. It is equally important that you decide all questions of fact upon your appraisal of the credibility of the witnesses and the weight to be accorded to the evidence and that your appraisal of the weight and credibility of the evidence be not influenced by any expression of opinion by the Court upon those matters.

" From time to time as this trial has progressed, it has been my duty as judge to rule upon objections and to decide questions related to the admissibility of evidence. In the course of the trial I have made certain statements and comments to counsel from time to time. No statement or comment by me in either of those instances was intended as an expression of an opinion by this court as to the credibility of any witness or as to the weight or credibility of the evidence. I impress upon you, ladies and gentlemen of the jury, that my comments and remarks made from time to time during the trial should be so understood by you; and

the accused knowingly and willfully became a member of the conspiracy. \* \* \*

"Before a jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. \* \* \*

"In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

"If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement given."

At another point in his charge, the court told the jury:

"If the accused be proved guilty beyond a reasonable doubt, say so. If not proved guilty beyond a reasonable doubt, say so.

"Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

*such act, conversation and statement and the several defendants.* (Emphasis supplied.)

"At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.'" (Emphasis. Court of Appeals, Seventh Circuit, Decision April 22, 1964, App. 3a.)

Though the *en banc* hearing was granted on a supposed inconsistency between *Pronger* and *Bernard*, the claimed inconsistency is never heard of again and is not even adverted to in the decision. However, as a result of this decision, a clear conflict with *Pronger* has been created and both stand as the law in this Circuit.

It seems fairly apparent that the instruction in *United States v. Pronger*, found to be reversible error, was less an imperative usurpation of the jury's function than the instruction given in this cause. It is difficult to conceive how the two can stand side by side as established law governing future proceedings in this Circuit. Certainly the practitioners in this Circuit are entitled to a definitive determination of what constitutes due process. The issue of conflicts between Circuits is a serious one to this Court in the universal administration of justice. The problem of conflicting laws in a single Circuit is more acute. In the general supervisory power of this Court, this serious problem should be resolved.

Not only do these two conflicting decisions, one denouncing a trial judge's implying a conspiracy had been established and the other upholding a clear statement to the jury

that the judge was satisfied the conspiracy existed, stand as the law of this Circuit, but this case states a new rule governing the function of the trial judge in conspiracy cases. See p. 3, *supra*. If the rule is the Court must be *satisfied*, we must consider the alternative of the issue. Let us assume that the judge is not satisfied with the testimony adduced, even though the evidence is such that makes a *prima facie* showing of a conspiracy, and the Court is not satisfied with the quality of the evidence, then he may never give to the jury the question of whether or not a conspiracy existed or whether or not the act was done in furtherance of the conspiracy. Let us assume that the evidence is overwhelming, and the Court is not satisfied that the witness is telling the truth. Though he may well be telling the truth, the want of satisfaction of the trial judge will never put to the jury the actual question of the guilt or innocence of the defendant, because this Court holds the determination of the existence of conspiracy depends on the satisfaction of the trial judge.

In other words, the Court of Appeals has endorsed a determination by the trial judge of the weight of evidence. It endorsed a ruling that "the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation, and statement of the several defendants," and that the trial Court's satisfaction is a determining feature.

## II.

There should be established some general rules to govern when a full Court sitting *en banc* will review the actions of a three judge panel of the same Court.

We can give no statistics on the number of *en banc* sittings that occur in the several Circuits of the United States Courts of Appeals. We do know that an *en banc*

After defining the crime of conspiracy in his charge, the trial judge instructed the jury, in pertinent part:

"If you find from the evidence beyond a reasonable doubt that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete; and it is complete as to every person found by you to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

"A conspiracy is an agreement between two or more persons to violate a law of the United States.

"In this case, the defendants are charged with having agreed, that is to say conspired to possess merchandise which had been stolen from interstate commerce, knowing the same to have been stolen from interstate commerce.

"Before you can find any defendant guilty of the offense charged in Count 1 of the indictment, you must first find, beyond a reasonable doubt, that such defendant entered into an agreement with another person; that that agreement addressed itself to the knowing possession of merchandise; that that merchandise was stolen from interstate commerce; and that such defendant knew it so to have been stolen at the time of entering into the agreement.

"If the Government has failed to prove any of the foregoing elements as to any defendant, then you must find such defendant as to whom the Government has failed to make such proof in a fashion that satisfies your mind beyond a reasonable doubt, not guilty.

"In your consideration of the evidence as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that such conspiracy did exist, you should next determine whether or not

printed pages of the appendix. Those pages reveal many, perhaps hundreds, of rulings by the court upon objections to evidence of one type or another. Through days this jury had observed the court in its function of determining questions of admissibility of evidence. Thus, the ruling in question is not an isolated incident, but only one of the many rulings upon admissibility which this jury observed and heard. The majority of this court must be little impressed with the efficacy of the jury system in general, and with the intelligence of this jury in particular. For my part, I believe it degrades both to conclude as the majority does, that this jury would mistake the comment in question for the statement of an opinion upon the issue of guilt.

We do not even have to conclude that the comment was not erroneous. If it be assumed to be error, when the comment is viewed in the light of this record it was harmless error.

Judge Mercer's ruling upon the pending objections came at the close of the government's case in chief. Thereafter, the trial continued for several days before the evidence was closed. The extent of the time elapsed between the comment in question and the court's charge to the jury is suggested by the fact that a narrative summary of the evidence for the defendants and the rebuttal evidence by the government fills 138½ pages of the printed appendix. The probable effect of the comment upon the jury must be determined in the light of that fact, and, further, by viewing the comment in its proper context with the court's final charge to the jury.

This trial closed with a charge in detail stating the law which the jury would apply. The point is best illustrated by quoting, verbatim, pertinent parts of that charge.

sitting is a rarity in the Seventh Circuit. Upon the initial hearing a decision was rendered wherein the Court speaking for the majority, one of the three judges dissenting, ruled as follows:

"We have no doubt that a statement by the court that the government had shown to the satisfaction of the court that a connection existed between such relevant evidence and the various defendants charged with conspiracy, undoubtedly had the effect of conveying to the jurors the court's belief that a conspiracy existed, which was the very question which the jury was required to ascertain. We are convinced that a jury would construe the word 'connection', used by the court in its oral statement, as closely akin to a conspiracy, as characterized by the court in the foregoing instruction." Op. April 22, 1964, 13915 (App. 4a).

The second judge specially concurring was moved to write a separate opinion, also a rarity in the Seventh Circuit. In that opinion he stated as follows:

"The concern so vigorously expressed by our brother, Judge Knoch, appears to overlook that the merits of the jury system can be preserved and protected only by permitting it to operate without interference by the trial court. Praise of the system does not serve to overcome the departure there from evidence by the record before us. It is essential to the proper preservation and operation of the jury system that the court not invade the province reserved to the jury—either directly or indirectly. It is unfortunate that the error occurred. That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks. And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the 'feeling of collective culp-

ability for a finding of individual guilt.' Cf. *United States v. Bufalino*, 2 Cir., 285 F. 2d 408, 417." (Op. April 22, 1964, No. 13915-18.) (App. 9a).

The dissenting judge did not consider that the giving of the instruction was not erroneous. He concluded that, assuming it to be error, it was harmless. (App. 12a.)

On the several opinions, the Government asked the seven judges of the Court of Appeals to sit in review. And they did so sit, notwithstanding, that all of the original three judges admitted, at least tacitly, the occurrence of error.

The Court, sitting *en banc*, made the same tacit admission by adopting the opinion of the dissenting judge in the April 22 decision, one judge dissenting. The dissenting judge continued in his decision that the instruction constituted reversible error, following the language of that judge who specially concurred in the April 22 opinion:

"The comment of a judge who concurred is pertinent:

"\* \* \* And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the "feeling of collective culpability for a finding of individual guilt." "

"I would reverse the district court in this case and remand it for a new trial." (App. 30a.)

It would seem that a determination that a jury "cannot be said to have been unimpressed by the Court's remarks" would not be vulnerable to a complete alteration of that opinion to the effect that the error was not reversible. We submit, that in the light of this confession alone, a finding of error not reversible is an absolute contradiction with this Court's determination in *Kotteakos v. United States*, 328 U. S. 750, where this Court said at pages 764 and 765:

The majority of the court does not hold that that ruling was error, or that the trial judge failed to apply correct principles of law to his ruling. What they do conclude is that Judge Mercer may have conveyed to the jury the idea that the conspiracy was proved because he stated the reason for his ruling that the evidence was admitted as to all of the defendants.

One must read certain parts of the court's comments out of context to find any such implication therein. In pertinent part, Judge Mercer said:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections had been made, I reserved my ruling thereon, upon the government's avowal to connect up such testimony.

"I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants."

So stating, the court then overruled all pending objections and admitted the evidence as to all defendants.

It must be remembered that this jury, during days of trial proceedings, had heard the United States Attorney promise upon many, many occasions that the government would "connect up" testimony then being offered in evidence. In the light of that fact, it seems clear to me that the same jury hearing the court's reference to "connected up" and "connection" in context, would understand that the comments related only to the question of the admissibility of the evidence, not to an ultimate issue of the case. Furthermore, this was not a one day trial. A narrative summary of the trial proceedings fills 377

but without the participation of all of the other defendants. The rule for the admission of such evidence against defendants who were not present when the acts were done or the statements made involves a determination by the trial judge that, independently of the statements of others, there is evidence adduced that a conspiracy existed and that the party against whom the evidence is sought to be introduced was a party to the conspiracy. The court must also be satisfied that the act or statement was done or made while the conspiracy existed and that it was in furtherance of the conspiracy. *E.g. Krulwich v. United States*, 336 U. S. 440 (1949); *Glasser v. United States*, 315 U. S. 60 (1942); *United States v. Konovsky*, 7 Cir. (1953), 202 F. 2d 721, 727; *Allen v. United States*, 7 Cir. (1924), 4 F. 2d 688, 694, rehearing den. (1925). The determination of such facts upon which admissibility depends is the province of the trial judge. *United States v. Dennis*, 2 Cir. (1950), 183 F. 2d 201, 230-231, affirmed 341 U. S. 494; *Carbo v. United States*, 9 Cir. (1963), 314 F. 2d 718, 737.

This trial was no exception. Repeatedly, during the presentation of the government's case, evidence of acts and statements by one or more of the alleged conspirators<sup>1</sup> was presented. Objections were made by all defendants not shown to have participated in such acts or statements. Upon the government's avowal that the tendered evidence would be "connected up" Judge Mercer reserved his ruling upon such objections. By the close of the government's case, there remained pending a great number of such objections upon which the court's ruling was reserved. Upon a motion by the government, Judge Mercer overruled all pending objections and admitted the evidence as to all of the defendants.

1. The appellants and Joseph Liscandrello who was not then on trial.

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. \* \* \* But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States*, 328 U. S. 750, 764, 765.

Why, then, was an *en banc* Court convened to reappraise the extent of the error committed? Giving due deference to the norm established by *Kotteakos* the basis for reappraisal by a full Court could only have been the product of the pounding publicity, the articles, the editorials, that ensued upon the reversal. We submit that this Court should determine whether a Court of Appeals should sit *en banc* in lieu of this Court to change its unpopular opinions, simply because they are unpopular.

### III

The main witness for the Government was the Defendant Covelli. This was recognized by the Court of Appeals in its opinion:

"The testimony of Gerald Covelli was a vital part of the Government's case." (App. ....)

The main witness for the defense was one Robert Westershausen. The substance of his testimony was that he and Covelli were prison mates at Leavenworth; that the two

of them had many conversations in which Covelli told him that he was being paid to put in the co-defendants on the whiskey theft. Westerhausen testified that Covelli had told him that he was feeding the F. B. I. "stuff" for 6 months previous; that he had been promised that he would be released if he would testify against the other individuals. He testified that Covelli told him that he had not told the F. B. I. who the real culprits were, that he had just given them names, and that they had accepted it. Westerhausen testified that Covelli told him that the persons who were his co-defendants weren't really involved, that they had nothing to do with the stolen liquor (A. 345-350).

Under the questioning of the prosecutor on cross-examination, Westerhausen testified that he had been confined in mental institutions, that he had been examined by Government psychiatrists about seven times; that he had attempted suicide on two or three occasions; that he went to Montefiore School for Boys, and it was brought out that this was a school for boys that didn't conform to the rules and regulations of other schools in Chicago. He further brought out that the witness was in a juvenile home at the age of 14 years and that he was in Pontiac Reformatory. It was brought out the witness carried a bullet wound, and that he had been *acquitted* of a robbery charge (A. 350-352).

Motions for mistrial were made on trial because of this improper attempted impeachment. Error was assigned in the Court of Appeals relating to the school for incorrigibles, the juvenile home, the reformatory, the psychiatric help, the bullet wound, and the robbery charge acquittal (A. 350-352).

The Court of Appeals for the Seventh Circuit, in its decision, made no reference at all to any of this information

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CASTLE, *Circuit Judge*, specially concurring. I agree with Judge Schnackenberg's resolution of the issue he finds dispositive of the appeals. The concern so vigorously expressed by our brother, Judge Knoch, appears to overlook that the merits of the jury system can be preserved and protected only by permitting it to operate without interference by the trial court. Praise of the system does not serve to overcome the departure therefrom evidenced by the record before us. It is essential to the proper preservation and operation of the jury system that the court not invade the province reserved to the jury—either directly or indirectly. It is unfortunate that the error occurred. That my distinguished colleagues are so divided as to the consequences which must be assigned to it convinces me that the jurors—laymen untrained in the niceties of the law—who looked to the trial judge for guidance, can not be said to have been unimpressed by the court's remarks. And the court's statement that it was satisfied that a connection existed between the acts of the several defendants invited a substitution of the "feeling of collective culpability for a finding of individual guilt." Cf. *United States v. Bufalino*, 2 Cir., 285 F. 2d 408, 417.

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КНОХ, *Circuit Judge* (dissenting): I cannot agree with the majority opinion and decision, and I therefore dissent. I am convinced that there is no substantial basis for reversal of these judgments as to count 1 of the indictment and no basis whatsoever for reversal of the judgments entered upon count 2 thereof.

A conspiracy trial inevitably presents the perplexing question as to the admissibility of evidence of acts and statements done or made by one or more of the defendants,

affirming the convictions on the basis of the verdict on count II only.

3. In addition to the matters which we have already discussed, we deem it appropriate to state that there is sufficient evidence in the record to support the verdict as to each of the defendants. We reject defendant's contention to the contrary.

4. Defendants have also alleged and assigned as error the admission of irrelevant, incompetent and prejudicial evidence, improper limiting of cross-examination, misconduct of government counsel, a denial of defendants' rights under 18 U. S. C. A. § 3500, a failure of the district court to examine the grand jury minutes of the testimony of witness Olshon in the circumstances, and errors by the court in the giving, and failure to give, certain instructions.

Inasmuch as we shall direct a new trial of this case, it is unnecessary at this time to rule upon these alleged errors. There is no reason to believe that, if errors in these respects were in fact committed, they will be repeated upon another trial.

For all of these reasons, the judgments and sentences from which these appeals were taken are reversed and this case is remanded for a new trial.

REVERSED AND REMANDED.

except that which went to the problem of psychiatric help which will be dealt with hereinafter. Though the Court of Appeals did not elect to notice it, its sanction of such impeachment is in direct conflict with the Court of Appeals for the District of Columbia in *Brown v. United States*, where that Court said at 338 F. 2d 543, pages 546-8:

"The Government does not contend that the inquiry was permissible on impeachment grounds; it was not. Although conviction of certain criminal offenses is a valid subject of examination aimed toward impeachment of a witness, a finding of involvement in law violation resulting in commitment to the National Training School is not the equivalent of a criminal conviction on any theory. *Thomas v. United States*, 74 App. D. C. 167, 169-171, 121 F. 2d 905, 907-909 (1941) (alternative ground). The District of Columbia Code only makes provision for impeachment upon showing 'conviction of crime.' Indeed, the prosecutor's question to Belton characterized the occasion for his commitment to the National Training School as 'for (a) crime.' The very form of the question ignored both the intent of the statute on impeachment and the essential nature and purpose of the Juvenile Court Act. Because of the purpose of the Juvenile Court Act and the absence of procedural safeguards, a finding of involvement against a juvenile does not have the same tendency to demonstrate his unreliability as does a criminal conviction for the adult offender.

"Moreover, the juvenile himself has a protected interest in maintaining the credibility of his public testimony. Whereas a convict—barring pardon—is forever faced with the hardships of a permanent criminal record, in the case of a juvenile '(i)t would be a serious breach of public faith \* \* \* to permit these informal and presumably beneficent procedures to become the basis for criminal records, which could be used to harass a person throughout his life.' *Thomas v. United States*, 74 App. D. C., at 170-171, 121 F. 2d at 908-909. (Footnotes omitted.) To this end the Juvenile Court Act provides:

'An adjudication upon the status of a child in the jurisdiction of the court does not operate to impose any of the civil disabilities ordinarily imposed by conviction, and a child is not deemed a criminal by reason of an adjudication. An adjudication is not deemed a conviction of a crime, and a child may not be charged with or convicted of a crime in any court, except as provided by section 11-1553.'

"D. C. Code Ann. § 16-2308(d) (Supp. III 1964). Congress intended that a child found involved by the Juvenile Court should be insulated from the disabilities attending conviction for a crime. We therefore hold that 'the language of the statute expressly forbids the interpretation that the disposition of a child in a juvenile court proceeding constitutes conviction of a crime.' and that since, 'nothing short of conviction of crime is sufficient to warrant' impeachment under D. C. Code Ann. § 14-305 (Supp. III 1964), the questions to Belton which elicited the fact of his commitment to the National Training School purportedly for a 'crime' were impermissible. *Thomas v. United States*, *supra*. (Footnotes omitted.) Since Belton's testimony exculpating appellant comprised a major portion of appellant's defense at trial, we cannot say it was harmless error to admit testimony for the purpose of showing 'criminal' nature on Belton's part in order to diminish his credibility as a witness. See *Kotteakos v. United States*, 328 U. S. 750, 764-765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); *Fahy v. Connecticut*, 375 U. S. 85, 91-92, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963)." *Brown v. United States*, 338 F. 2d 543, 546-8.

#### IV.

After this illegal attempt at impeachment, the defense attempted to rehabilitate the witness. Referring to his mental condition the witness reiterated his memory of testimony given by doctors. He said they testified that his was a childhood disease that gradually grew worse until

knowledge on the part of the accused that the goods were stolen". The jury was correctly told:

"\* \* \* The crime as alleged in Count II consists of possessing it knowing said goods to have been stolen, and you cannot find the defendant guilty of Count II of this indictment unless you believe beyond a reasonable doubt that such defendants knew the goods were stolen, but it is not necessary to warrant a conviction under Count II that the defendants knew the goods were stolen from an interstate shipment. They must indeed have been stolen from an interstate shipment of freight, but it is sufficient guilty knowledge if he knows they were stolen."

To us it is apparent that the government had the burden of proving that each of the four defendants on trial knew that the goods were stolen. The burden of proof beyond a reasonable doubt, of course, rested upon the government, but, as to count II, the government's case did not rely upon the existence of a conspiracy, as charged in count I. In this situation the difficult task placed upon the jury in its consideration of the evidence was to separate those parts which were admitted under the conspiracy count, from any evidence tending to prove the charge in count II.

Considering the length of the trial, the number of witnesses and the difficulties inherent in making this separation in their minds, it is our opinion that laymen jurors would have become so confused as to be unable to perform their function effectively. The error in the court's remarks to the jury could not practically have been confined in the juror's minds to count I when the jury was also considering the evidence insofar as applicable *only* to count II. Thus we are required to reverse the judgments and sentences on count II.

We find it appropriate to make these remarks, in view of the fact that we have contemplated the possibility of

But the court did instruct that evidence, with certain exceptions, which when received was not to be considered against any defendant to whom the evidence did not pertain; could thereafter be considered as to all defendants if the jury found that there was a common plan or design proved.

We there held that the question of whether there was such a plan or design was properly submitted to the jury.

At no place in *Bernard* did it appear that the district court attempted to give any reason or explanation for its ruling, which was undoubtedly correct. The court simply announced to the jury its ruling admitting the evidence against all defendants, but left to the jury the question of deciding whether a common plan or design was proved beyond a reasonable doubt. We adhere to the opinion written by District Judge Mercer, who sat with us in deciding that case.

We are constrained to hold that, in the case at bar, the expression of the court's reasons did have the effect of suggesting to the jurors that the court believed that a conspiracy existed, and for that reason invaded the province of the jury. This requires a reversal of the judgments and sentences on count I.

2. In view of our holding in regard to count I, it becomes necessary to consider the verdict, judgments and sentences, insofar as they pertain to count II, which charges defendants with possession of whiskey stolen from a shipment in interstate commerce and known by them to have been stolen.

The court instructed the jury that each offense and the evidence applicable thereto should be considered separately. The jury was further instructed, specifically as to count II, that the essence of the offense there charged "is guilty

the year 1952, when it was very pronounced, that he had been suffering from mental illness from about the age of six. He said that in 1955, when they came out with the wonder drugs and when they were administered to him, he began to feel better and his memory began to clear up. On recross-examination, the following occurred:

"Q. You never paid Mr. Oliver for the favor he did for you in having you set free by reason of insanity?

"A. No, sir.

"Q. You stated that your memory began to better about 1955, is that right?

"A. Yes.

"Q. Do you now recall killing your stepmother?

"Mr. Oliver: Your honor, I object. I think that is a vile, filthy stroke, and I think the prosecutor knows it.

"Mr. Echeles: And I have a motion for as mistrial, if your Honor please.

"The Court: I didn't hear the question. I will have to have it read.

(Question read).

"The Court: Well, that is an improper question. Was it answered?

"The Witness: No.

"The Court: Don't answer it. The objection is sustained."

"The jury is instructed and admonished by the Court to pay no attention whatever to the last improper question by the Government." (A. 356-357.)

In commenting upon this occurrence assigned as error the Court of Appeals stated:

"It is contended that this admonition was insufficient and that a motion for mistrial should have been allowed. Although adjudged restored to sanity, the witness's interest, possible prejudices and accuracy of memory, and factors affecting these, were all proper subjects of cross-examination. The government was entitled to elicit pertinent circumstances affecting his

credibility. *U. S. v. Lawinski*, 7 Cir., 1952, 195 F. 2d 1, 7. As the government argues, Mr. Westerhausen's mental history was extremely complex, *U. S. v. Westerhausen*, 7 Cir., 1960, 283 F. 2d 844, 848, including not only loss of memory, but auditory hallucinations. After carefully weighing the matter, we do not agree that this one question, which the Trial Judge held to be improper and on which the jury were promptly instructed, required a mistrial." (App. 27a.)

Of course this wasn't one question. The other questions have been gone into in the next preceding point. It is of interest to note that the "loss of memory, but auditory hallucinations" were this man's symptoms in 1952, 8 years before the events with which this case is concerned, and ten years prior to the testimony given by Westerhausen. See *United States v. Westerhausen*, 7 Cir., 283 F. 2d 844 at 848. The decision of the Court of Appeals rests on a testing of memory. It thus becomes evident that the Court of Appeals, as the jury, accepted the fact that Westerhausen had a step-mother, and that he killed her, but he was relieved from having to state when these presumed facts were recalled to his memory. Accusations and matricide are clearly not the kind of remarks that the jury put out of their mind simply by being told to do so. The Court of Appeals is in direct and clear conflict with prevailing law in other circuits. In *United States v. Georgia*, 3 Cir., 210 F. 2d 45, the Court said at page 47:

"When remarks have been made in a trial which should not be made and the court carefully instructs the jury to disregard them, it is a question of judgment whether what was said was sufficiently misleading or prejudicial to call for reversal. It is not the kind of thing where the statement of a general rule or the citation of authorities can give very much aid. We are clear in our own minds that this case is one which falls on the reversal side. The suggestion, that

the charges made and that the jury should determine, from evidence, whether or not the defendants were guilty of the charges. In referring to certain remarks of the court, we said, at 500:

"In a case such as this a defendant cannot be bound by the acts or declarations of another defendant until the common design or common concert of action between the two defendants and their participation have been established. *Glasser v. United States*, 315 U. S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680; *United States v. United States Gypsum Co.*, D. C., 67 F. Supp. 397, 451; *May v. United States*, 84 U. S. App. D. C. 223, 175 F. 2d 994, 1008.

"Whether intentional or not, we believe that the court's remarks had the effect of telling the jury that the government had proved that the common design or common concert of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach v. United States*, 326 U. S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350."

We reversed as to defendant Pronger and remanded for a new trial. —

In the case at bar, in attempting to justify the statement by the district court that the government had shown to the court's satisfaction that a connection existed between the evidence to which the court referred and the various defendants, government counsel rely on *United States v. Bernard*, 287 F. 2d 715 (1961). However, at 720, it appears that the district court's statement to the jury not only was different from that used in the case at bar, but was properly limited so as not to convey to the jury the opinion of the court that a common plan or design had been shown to exist.

Faced with the duty of deciding whether a conspiracy had been proved by the evidence, the jury was aware that the court had told it that the government had "shown to the satisfaction of the Court that a *connection* does exist between each such act, conversation and statement and the several defendants." (Italics supplied). It was for this reason that the court instructed the jury that it might consider certain evidence, which it had mentioned, against such other defendants who were not then present, as well as against those defendants who were present and participating in such statements and conversations.

Of course the court had the duty to make a ruling upon the objections in question. However, we know of no requirement that the court state to the jury its *reasons* therefor. We have no doubt that a statement by the court that the government had shown to the satisfaction of the court that a connection existed between such relevant evidence and the various defendants charged with conspiracy, undoubtedly had the effect of conveying to the jurors the court's belief that a conspiracy existed, which was the very question which the jury was required to ascertain. We are convinced that a jury would construe the word "connection", used by the court in its oral statement, as closely akin to a conspiracy, as characterized by the court in the foregoing instruction.

In *United States v. Pronger*, 287 F. 2d 498 (1961), where defendant Pronger had appealed from a judgment convicting him on the verdict of a jury on a two-count indictment involving the movement in interstate commerce of a stolen automobile, it was urged at the trial that there was a common scheme or plan between Pronger and a second defendant. The court instructed the jury that it should find whether or not there was any common design or common concert of action between the defendants with regard to

every time one person like the defendant got from nonquota to quota status someone else was kept from coming, is not the kind of thing calculated to make a jury deal lightly with one being prosecuted for such a charge as this. And we think, too, that the jury was invited to substitute its own views and experience, and that of government counsel, for the evidence in the case" *United States v. Georgia*, 210 F. 2d 45, 47.

And, again, the same principle was reiterated in *United States v. Jones*, C. A. D. C., 338 F. 2d 553, where the Court said at 554:

"It is true that the court instructed the jury that the opening statement of counsel was not evidence. It is also true that the answers to the questions containing the factual assertions denied them and that the jury was instructed to disregard one of the questions. Nevertheless, we are not in a position to say, in a case as paper-thin as this one appears to be, that the suggestions contained in the opening statement and in the questions were not responsible in some degree at least, for the convictions in these cases" *Jones v. United States*, 338 F. 2d 553, 554.

We respectfully submit that this case, and this remark particularly, presents a clear appeal by the prosecution to passion and prejudice concerning matters irrelevant to the case, to a degree not duplicated in any other reported authority.

## V.

An agent for the F.B.I. testified on the government's case that there was a conversation between the co-defendants Falzone and Covelli and the prosecutors Monaghan and Quan and himself. In the conversation, Mr. Monaghan, the prosecutor, by way of interrogating the co-defendant Falzone recited essentially what had been the witness Covelli's testimony on the stand. In essence these questions

did not appear to have been answered, except on one occasion where Falzone, according to the testimony of Agent Weatherwax, corrected the recitation being made by Monaghan. Agent Weatherwax's testimony was that Monaghan had said to Falzone that Covelli had told them that on the evening that the Cafe Continental and the taverns were inspected Covelli went to see this Petitioner concerning counsel in the matter; that this Petitioner told Covelli to lay low and Covelli said that he would like to get this matter straightened out and Covelli related that Allegretti said "I'll reach out and see if we could put the fix in and clear up this beef;" that Covelli said that the following day he heard from this Petitioner, who advised that it would take \$5,000 to put the "fix" in and that Covelli's portion would be \$2,500; that Covelli said that he and Falzone went around and tried to raise the \$2,500.00 necessary. At this point, according to Agent Weatherwax, the co-defendant Falzone corrected a date. This conversation took place in the United States Attorney's office in April of 1960 (App. 267-274). Since a prior consistent statement of the witness Covelli is obviously unacceptable, the only mode by which this type of testimony could attain some degree of acceptance, however minimal, would be for it to attain the standing of an admission of Falzone and an adoption of the statements of Covelli by the correction of a date. This testimony was admitted against all co-defendants (App. 296-297).

The Court of Appeals for the Seventh Circuit sanctioned the admission of testimony on the ground that "Gerald Covelli testified to seeing some of the stolen whiskey in the possession of fellow conspirators two weeks after the earlier raid on some of the cafes" (App. \_\_\_\_\_). No attention at all was given to the necessary ingredient that the statements be in furtherance of the conspiracy, which of course these were not, nor of the fact that the

"I now rule that the Government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants. [Emphasis supplied].

"At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.

"I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.

"Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time."

Thereupon all defense counsel joined in a motion for a mistrial, on the ground that the court had invaded the province of the jury. That motion was denied. Thereupon the government rested its case, and the evidence in defense was received.

1. It is undisputed that the government had the burden of submitting to the jury sufficient evidence showing beyond a reasonable doubt that the conspiracy charged in count I existed and that defendants were members thereof. The court accordingly instructed the jury as to its duty in this respect. He also defined the term "conspiracy", as set forth in 18 U. S. C. A. § 371. The court characterized a conspiracy as "a kind of 'partnership in criminal purposes' in which each member becomes the agent of every other member."

defendants, have severally appealed from judgments on the verdict of a jury and their sentences to imprisonment in pursuance thereof.

Defendants were tried on an indictment charging in count I that they and Joseph Lisciandrello and Gerald Covelli conspired to possess goods which they knew were stolen from an interstate shipment, in violation of 18 U. S. C. A. § 371. In count II they were charged with possession of Old Sunnybrook whiskey stolen in interstate commerce, and known to have been stolen, in violation of 18 U. S. C. A. §§ 2 and 659.

Although the indictment was returned in the district court for the Northern District of Illinois, Eastern Division, it was transferred to the district court for the Southern District of Illinois, Northern Division, for trial.

Defendant Joseph Lisciandrello, who suffered illness during the trial, was granted a mistrial.

The trial started on March 28, 1962. Ending on April 12, 1962, the jury heard the testimony of 20 government witnesses, as the court reserved its rulings upon repeated objections made by defense counsel to parts of the testimony, relating to acts, conversations and statements made by one or more of the defendants, out of the presence of the other defendants.

The district court, on April 12, 1962, spoke directly to the jury and said:

"Ladies and gentlemen, will you please give me your attention:

"From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.

statement itself was made two years after the end of the conspiracy charged."

We submit that the ruling of the Court of Appeals for the Seventh Circuit in this case is directly contradictory and in direct conflict with the recent decision of the Tenth Circuit in *Gay v. United States*, 322 F. 2d 208, where the Court said at 209:

"The first point to be considered on the appeal is the admissibility of certain testimony of an F.B.I. Agent in which he described certain statements made to him by the alleged co-conspirator. In this testimony the agent recited in some detail the statements of the co-conspirator to the effect that appellant knew the cars were being stolen, that they both would transport them to Utah, make out Utah registrations, and take them to Mexico to sell; also that appellant made out the Utah registration slips. These statements were made by appellant's alleged co-conspirator to the agent at the Salt Lake City jail after the co-conspirator and appellant had been arrested. The statements were in effect a recitation of the facts concerning the conspiracy, by the co-conspirator, after the conspiracy had been terminated. Under the standards described by this court in several cases, this testimony was not admissible against the appellant because the statements of the co-conspirator were made after the conspiracy had ended, if there was one, and they were not of course made in furtherance of the conspiracy nor its objects. It was so held in *Minner v. United States*, 57 F. 2d 506 (10th Cir.), *Cleaver v. United States*, 238 F. 2d 766 (10th Cir.), and recently in *Tripp v. United States*, 295 F. 2d 418 (10th Cir.). Thus it was error to have admitted the above described testimony of the F.B.I. Agent" *Gay v. United States*, 10 Cir., 322 F. 2d 208, 209.

To the same effect condemning such testimony by government agents of the same circuit see *Tripp v. United States*, 295 F. 2d 418, 423; and out of the Sixth Circuit,

*United States v. Dunne*, 299 F. 2d 548, where the Court reversed in the same circumstances as constituting plain error under Rule 52(b) of the Federal Rules of Criminal Procedure; and out of the Fifth Circuit, *Thompson v. United States*, 227 F. 2d 671, 674; and out of the Second Circuit, *United States v. Ah Kee Eng*, 241 F. 2d 157, 160.

Though not made to a government agent, this Court's decision on a post-conspiracy statement in *Krulevitch v. United States*, 336 U. S. 440, equally conflicts with the decision herein.

## VI.

The charges in this indictment were an agreement to "unlawfully possess certain goods and chattels . . . which . . . had been stolen, taken and carried away from the motor truck trailer United No. 775 . . . on or about the 30th day of December, 1957," and the substantive crime of possession of those same chattels (A. 29-30).

The decision of the Court of Appeals found the evidence in the record sufficient to support that verdict as to each of those defendants (App. 23a). If it was sufficient, it was barely sufficient as to this Petitioner, a very thin case. Extensive evidence was then introduced regarding an effort to "squash the beef" after the discovery of the whiskey. Covelli testified that around the 3rd or 5th of April this Petitioner talked to the co-defendant Joseph Lisciandrello, and then said to Covelli, "Everything will work out and everything will be O.K. Get out of town for two weeks." (App. 146); that about two weeks later, Covelli saw Allegretti in Valentino's in Chicago (App. 147); that Allegretti told him he had reached out and made a connection to "squash the beef"; that it would cost \$5000 to do it (App. 153, 211, 226), of which Covelli was to produce half to cover Darlak, Falzone and Covelli, and the other half was to represent the two Lisciandrellos (App. 53). He

## APPENDIX.

### IN THE UNITED STATES COURT OF APPEALS For the Seventh Circuit.

Nos. 13915-18 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 13915	vs.	JAMES ALLEGRETTI, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 13916	vs.	DAVID FALZONE, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 13917	vs.	FRANK LISCIANDRELLO, Defendant-Appellant.
UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 13918	vs.	LOUIS DARLAK, Defendant-Appellant.

Appeals from the  
United States Dis-  
trict Court for the  
Southern District  
of Illinois, North-  
ern Division.

April 22, 1964

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. James V. Allegretti,  
Louis A. Darlak, David Falzone and Frank Lisciandrello,

dulge its own will." *AFL v. American Sash and Door Co.*, 335 U. S. 538, 557.

The result here has been a decision that cannot do other than cause havoc in the processes of justice.

WHEREFORE, we pray the writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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ANNA R. LAVIN,

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MAURICE J. WALSH,  
*Attorneys for Petitioner.*

further testified that late that afternoon he handed \$2500 to petitioner (App. 154); that, then, petitioner left the restaurant and walked out the back way; that he, Covelli, saw petitioner walk to the car by Wabash Avenue near the alley and saw him talking to somebody in the car (App. 154-5).

A witness Max Olshon testified that the Defendant Falzone after his arrest had told him "But, I'm not too worried, Jimmy will straighten out the whole case for us" referring to this petitioner (A. 69).

This Petitioner particularly claimed as error the repeated testimony relative to his "quashing the beef". With typical aplomb the Court of Appeals for the Seventh Circuit ignored that protest. Referring only to the claimed statement of Falzone, which reads more like a hope than any promise by this petitioner, the Court of Appeals stated:

"Max Olshon testified that when released on bond, David Falzone stated that he was not unduly worried because Jimmy Allegetti would 'straighten out the whole case.' Gerald Covelli testified that he and David Falzone then engaged in efforts to raise the money requested by James Allegetti for that purpose. There was evidence that David Falzone continued to participate in the conspiracy. *U. S. v. Aguecci*, 2 Cir., 1962, 310 F. 2d 817, 839, and cases there cited. It was not necessary for the government to prove what, if anything, James Allegetti actually did to 'straighten out the case,' and continue the conspiracy. There was evidence that he asked for money and that, after David Falzone's arrest and release on bond, Falzone and Gerald Covelli did raise such sums which were turned over to James Allegetti to be used for that purpose." 13915 Op. p. 3, December 22, 1964 (Emphasis Ours) (App. ....).

There was no evidence of any contact between this petitioner with Falzone prior to the conversation of Falzone and Olshon to justify the statement. There was no evidence of any prearranged assurance of continuous aid. Compare *United States v. Bresher*, 2 Cir., 242 F. 2d 642. It was the objection of this petitioner on appeal that because of such evidence, conviction rests, at least equivocally, upon evidence not within the full scope of the indictment, in conflict with *Stirone v. United States*, 361 U. S. 212 and the Ninth Circuit decision in *Poonian v. United States*, 294 F. 2d 74. We submit that it is now firmly established that efforts to prevent conviction and punishment are not part of a conspiracy to possess whiskey, nor can such efforts be considered as having aided and abetted the charged conspiracy. We submit that the decision of the Court of Appeals for the Seventh Circuit is in direct conflict with *Krulewitch v. United States*, 336 U. S. 440 and *Gruenwald v. United States* 353 U. S. 391. We submit that the decision of the Court of Appeals violates the rule set down by this Court in *Pettibone v. United States*, 148 U. S. 197 and *Asgill v. United States*, 4th Cir., 60 F. 2d 780, the terms of the agreement must be set forth in the charges and until this is done evidence of the conduct of the parties cannot be held to be competent or responsive to the then alleged agreement.

This ruling of the United States Court of Appeals is most perplexing when one of the judges sitting, in a concurring opinion, in *United States v. Rosenblum*, 176 F. 2d 321 stated at page 332:

"The only possible basis for the consideration of such evidence on the conspiracy charge was the theory adhered to by some courts, see *United States v. Krulewitch*, 2 Cir. 167 F. 2d 934, 948; *United States v. Goldstein*, 2 Cir., 135 F. 2d 359; *Murray v. United States*, 10 F. 2d 409 that there necessarily was an agreement among the alleged conspirators to conceal the viola-

tion after as well as before the illegal plan is consummated. I believe this theory has now been definitely discarded. *Krulewitch v. United States*, 336 U. S. 440; 443, 69 S. Ct. 716" *United States v. Rosenblum*, 176 F. 2d 321, 332.

Directly in point factually, and in direct conflict legally with this case is the Second Circuit's recent decision in *United States v. Birnbaum*, 337 F. 2d 490:

"\* \* \* And, even if the attorney might have arranged a 'fix' (of which there was no proof), this fact would have been totally irrelevant to the crimes charged, i.e., conspiracy and the bribery of Simon. Compare *United States v. Stadter*, 336 F. 2d 326 (2d Cir., 1964); *United States v. Eury*, 268 F. 2d 517 (2d Cir., 1959); *United States v. Barnett*, 280 F. 2d 889 (2d Cir., 1960). This testimony was inadmissible and prejudicial." *United States v. Birnbaum*, 2d Cir., 337 F. 2d 490, 497.

### CONCLUSION.

This Court is conscious that cases attended by overwhelming publicity spawn a disregard for recognized legal principles. This was such a case because of the prejudicial publicity heaped on the petitioner. Prior to trial the attendant publicity provoked a transfer of the cause to another forum. It did no good. The Chicago press followed to Peoria in the Southern District of Illinois.

Upon reversal of an obviously bad conviction, the criticism of the decision in the press took the form, not only of articles, but of editorial attack. The impression on all but one member of the Court is demonstrated by the grant of the Rehearing *en banc* on a question where an entire panel conceded error, but were divided on the gravity of the error.

"A Court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion in-

F B I

Date: 4/12/65

Transmit the following in \_\_\_\_\_  
(Type in plaintext or code)Via AIRTEL \_\_\_\_\_  
(Priority)

Mr. Tolson	_____
Mr. Belmont	_____
Mr. Mohr	_____
Mr. DeLoach	_____
Mr. Casper	_____
Mr. Callahan	_____
Mr. Conrad	_____
Mr. Felt	_____
Mr. Gale	_____
Mr. Rosen	<i>For file</i>
Mr. Sullivan	_____
Mr. Tavel	_____
Mr. Trotter	_____
Tele. Room	_____
Miss Holmes	_____
Miss Gandy	_____

TO : DIRECTOR, FBI (15-38700)

FROM : SAC, CHICAGO (15-12848)

SUBJECT: GERALD COVELLI; ET AL  
 TFIS - CONSPIRACY;  
 OBSTRUCTION OF JUSTICE -  
 BRIBERY; MISPRISION OF  
 FELONY

Chicago newspapers issued on 4/12/65 reflect that  
 DAVID FALZONE, a defendant in captioned matter, died of a  
 heart attack Saturday night, 4/10/65.

Death will be verified.

- ③ - Bureau  
 1 - WFO (15-4370)  
 1 - Chicago

JJO:cah  
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EX 105

REC 27

15-38700-269

21 APR 14 1965

C. C. Wick

Approved: *[Signature]*  
 Special Agent in Charge

Sent \_\_\_\_\_ M Per \_\_\_\_\_

4-13-65  
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UNITED STATES GOVERNMENT

# Memorandum

TO : DIRECTOR, FBI (15-38700)

DATE: 4/22/65

FROM : SAC, WFO (15-4370) (P)

SUBJECT: GERALD COVELLI; et al  
TFIS - CONSPIRACY;  
OBSTRUCTION OF JUSTICE -  
BRIBERY; MISPRISION OF FELONY  
(OO:CG)

ReWFOlet to Bureau dated 3/12/65, and CGairtel  
to Bureau dated 4/12/65.

Examination of the docket in the U. S. Supreme  
Court (USSC) on 4/20/65, discloses the JAMES ALLEGRETTI  
LOUIS DARLAK and DAVID FALZONE Cases (924, 925, and 926  
Appellate) continue under consideration by the Court.  
The docket discloses that on 3/17/65, an agreed order was  
filed on each of these cases in which time to file a  
response to Petitions for Writ of Certiorari was extended  
to 4/26/65.

WFO will continue to follow these cases in the  
USSC.

REC-47

15-38700-270

EX-102

12 APR 23 1965

2-Bureau /  
1-Chicago (15-12848)  
1-WFO

RCV/dan  
(4)



66 APR 27 1965

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

APR 27 9 24 AM '65

U.S. DEPT. OF JUSTICE  
F.B.I.

15 8 1 10

TO DIRECTOR, FBI (100-442100) FROM SAC, NEW YORK (100-100000) (P)

RE NEW YORK TELETYPE TO BUREAU, APRIL TWENTY SEVEN LAST, AND BUREAU TELETYPE TO NEW YORK, APRIL TWENTY SEVEN LAST, RE: JAMES EARL RAY, AKA; ALLEGED ATTEMPT TO OBTAIN PASSPORT FOR TRIP TO EUROPE; NEW YORK OFFICE ADVISED THAT RAY HAD BEEN ADVISED BY AN INDIVIDUAL WHO OFFERED HIM A PASSPORT FOR TRIP TO EUROPE, BUT RAY HAD REFUSED THE OFFER.

NEW YORK OFFICE IS CURRENTLY CONDUCTING INVESTIGATION OF THIS MATTER AND WILL REPORT RESULTS TO BUREAU AS SOON AS AVAILABLE.

ADMINISTRATIVE: NEW YORK OFFICE IS CURRENTLY CONDUCTING INVESTIGATION OF THIS MATTER AND WILL REPORT RESULTS TO BUREAU AS SOON AS AVAILABLE.

100-442100 (100-100000)



UNITED STATES GOVERNMENT

# Memorandum

TO : DIRECTOR, FBI (15-38700)

DATE: 5/18/65

FROM : SAC, WFO (15-4370) (RUC)

SUBJECT: GERALD COVELLI; et al  
TFIS - CONSPIRACY;  
OBSTRUCTION OF JUSTICE -  
BRIBERY; MISPRISION OF FELONY  
(OO:CG)

ReWFOlet to the Bureau dated 4/22/65.

In an Order List handed down on 5/17/65, the U. S. Supreme Court denied Petitions for Writ of Certiorari in the following cases:

JAMES ALLEGRETTI vs. The United States, case number 924, Appellate;

LOUIS DARLAK vs. The United States, case number 925, Appellate;

DAVID FALZONE vs. The United States, case number 926, Appellate.

As this matter has been concluded in the Supreme Court, no further inquiry remains for WFO.

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- ② - Bureau  
1 - Chicago (Info) 15-12848  
1 - WFO

EX-101

15 MAY 20 1965

RCV:mek  
(4)



MAY 24 1965

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

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FOUNTAIN BLVD. THE DISTRICT OFFICE OF THE U.S. DEPT. OF JUSTICE

UNREGELETER VERKEHR

SECRET NOTED BY ALL INFO OFFICE DATE 7-10-68

TO: JUDGE: CARRER:

IN AN ORDER THAT WANTED TO BE ON 2/11/68, SHE H. 1.

15-LOTER FOR THE UNITED STATES OF AMERICA

( 7:30 )

ВЕРХНИЙ ИЛИ СЕВЕРНЫЙ

COLLECTION OF OBJECTS -

Таб. 2 - СИСЫНДЫ:

CONFIDENTIAL: NO ST

PRO. 10 (8-1210) (ENC)

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ENCLOSURES TO BUREAU  
BUFILE 15-38700  
WFO 15-4370



15-38700-271

15-38700-271

Nos. 924, 925 and 926

In the Supreme Court of the United States

OCTOBER TERM, 1964

JAMES ALLEGRETTI, PETITIONER

UNITED STATES OF AMERICA

LOUIS DARLAK, PETITIONER

UNITED STATES OF AMERICA

DAVID PALZONE, PETITIONER

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX

Solicitor General,

HERBERT J. MILLER, Jr.,

Assistant Attorney General,

BEATRICE ROSENBERG,

THEODORE GEORGE GILINSKY,

Attorneys,

Department of Justice,

Washington, D.C. 20530.

15-38700-271

meeting. The agent described Falzone's corrections as to dates and other occurrences and testified to the entire conversation among all those present, including what the government had told Falzone it knew of the facts previously related by Covelli (A. 271-273).

After Falzone had given his version of the 1960 meeting (A. 321-322, 330-332), the F.B.I. agent, in rebuttal, testified as to further conversation with Falzone.<sup>8</sup> All of this testimony was limited to Falzone (A. 268, 424, 426). As thus limited, its admission was clearly proper. *Opper v. United States*, 348 U.S. 84, 94.

#### CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,  
*Solicitor General.*

HERBERT J. MILLER, JR.,  
*Assistant Attorney General.*

BEATRICE ROSENBERG,  
THEODORE GEORGE GLINSKY,  
*Attorneys.*

APRIL 1965.

<sup>8</sup> Petitioners complain that the government sought to frighten Falzone into not testifying (No. 925, p. 10; No. 926, p. 10). However, this is merely Falzone's version regarding his motives for testifying for Allegretti in this case (cf. A. 427-431).

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conversation, but the trial judge carefully limited its admissibility to the petitioner who directly participated in the conversation.

During cross-examination of Covelli, the defense brought out that he had made a previous statement wherein he disclosed that the conversation regarding "squashing the Beef" had taken place on the day after the raid, *i.e.*, March 18, 1958, rather than some two weeks later (cf. Statement, *supra*). On further questioning, Covelli admitted that petitioner Falzone had corrected him as to the time during a meeting in April 1960, in the United States Attorney's office in Chicago, and that the government attorneys and an F.B.I. agent were present (A. 226-228). On re-direct examination, the testimony regarding this 1960 meeting was admitted solely against petitioner Falzone and was so limited in instructions to the jury (A. 231-232, 233-237, 238).<sup>1</sup> Covelli described how Falzone had corrected him as to various previous statements and also that Falzone had said he would cooperate with the government, but wanted to be named as a defendant so that the others would know he was not talking (A. 238-239, 240). On recross there was more inquiry as to who was present (A. 245).

Later in the trial, when the government placed the F.B.I. agent on the stand for other purposes, he was questioned as to what was said at this April 1960

<sup>1</sup> Petitioners' citations (No. 924, pp. 27-28) are inapposite because, contrary to their assumption, this testimony, unlike that in the cited cases, was explicitly limited to Falzone (see A. 238, 268).

had made a connection to "squash the beef" and told Covelli to raise \$2,500, which, together with Allegretti's \$2,500, would be used to take care of the matter so that he would not lose his place of business (A. 146, 147, 153). Covelli met Falzone, and together they talked to Darlak about raising the money (A. 153). After some difficulty, \$2,500 was raised and given to Allegretti, who took the money, went out the back door, and handed it to someone in a car (A. 154).<sup>6</sup>

These transactions were clearly in furtherance of a conspiracy, which by no means came to an end on March 17, 1958. Stolen whiskey had been stacked in places other than those raided, including Ciro's Cocktail Lounge, in accordance with Allegretti's directions. The destruction of part of the whiskey and the efforts to "squash the beef" in order to stay in business are wholly consistent with the further possession and distribution of the rest of the whiskey. The arrest of Falzone did not terminate the scheme. See *United States v. Agueci*, 310 F. 2d 817, 839 (C.A. 2), certiorari denied, 372 U.S. 959. See also *Hyde v. United States*, 225 U.S. 347, and *Pinkerton v. United States*, 328 U.S. 640, 646-647.

4. Petitioners complain of the admission of statements by two of the co-conspirators in April 1960 (No. 924, pp. 25-28). However, not only did petitioners originate this inquiry on cross-examination and thus open the door to admission of the whole

<sup>6</sup> This latter evidence was admitted solely against Allegretti and Falzone. The court sustained objections thereto as to Frank Lisciandrello and Darlak (A. 154).

## In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 924

JAMES ALLEGRETTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 925

LOUIS DARLAK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 926

DAVID FALZONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The April 22, 1964, opinion of the court of appeals (No. 924, App. 1a-20a) is reported at 340 F. 2d 243.

(1)

The December 22, 1964 opinion of the court of appeals sitting *en banc* (No. 924, App. 22a-30a) is reported at 340 F. 2d 254.

#### JURISDICTION

The judgment of the court of appeals was entered on December 22, 1964 (No. 924, App. 31a). A petition for rehearing was denied on January 21, 1965 (No. 924, App. 32a), and the petitions for writs of certiorari were filed on February 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

1. Whether the court properly ruled in the presence of the jury at the close of the government's case that all the evidence on which ruling had been reserved was admissible against all the defendants whether or not present, on the ground that the court was satisfied that a sufficient connection had been shown.

2. Whether the government's cross-examination of an impeaching defense witness was proper.

3. Whether certain statements made after discovery of some of the stolen whiskey were admissible as in furtherance of the conspiracy.

4. Whether post-conspiracy statements were properly admitted solely against the one petitioner who participated in the conversation.

#### STATEMENT

Petitioners<sup>1</sup> were convicted by a jury in the United States District Court for the Southern District of

<sup>1</sup> Co-conspirator Covelli pleaded guilty (A. 13, 162) and testified for the government at the trial (A. 137-246). Co-defendant Joseph (Ruffy) Lisciandrello was severed during

properly ruled that this one question—a question which the trial judge held to be improper and on which there was prompt instruction—was not ground for a mistrial in light of the overwhelming proof of guilt of crimes about which the witness, who was offered only for impeachment, had no personal knowledge.

3. Petitioners complain of the admission of statements by co-conspirators subsequent to March 17, 1958, when some of the whiskey was seized (No. 924, 28-31). However, the indictment charged, and the evidence showed, that the conspiracy continued after the raid, which netted only 34 cases.

After the raid on March 17, 1958, petitioner Falzone was taken to F.B.I. headquarters where he called Max Olshon to bring him some food. Falzone gave Olshon the keys to close the cafe and also told Olshon to get rid of the whiskey in the walk-in box (A. 69). That evening Olshon dumped 24 gallons, breaking the bottles, and gave one gallon to the cook to take home (A. 69). Falzone, who was released the following day, told Olshon that he (Falzone) was not "going to take the whole fall myself," mentioning Jimmy (James Allegretti), Ruffy (Joseph Lisciandrello) and Louis (Louis Darlak). "But, I am not too worried," he said, "Jimmy will straighten the whole case out for us" (A. 69).

Meanwhile, on the night of the raid, Covelli, after seeing Allegretti and Lisciandrello, left town for two weeks (A. 146). On his return he saw Allegretti, Lisciandrello and others. Allegretti claimed that he

But there were other circumstances bearing on his credibility which the government was fully warranted in attempting to bring out. Westerhausen had obtained a reversal of his conviction on a federal charge on the ground that the government had failed to sustain its burden of showing that Westerhausen was "sane" at the time of the crime, and the details of Westerhausen's extensive mental history had been developed in that case, in which he was represented by Frank Oliver, attorney for one of the petitioners. See *United States v. Westerhausen*, 283 F. 2d 844 (C.A. 7). Under these circumstances the government was properly allowed a broad scope of cross-examination, not only to develop his possible interest, bias, and association with counsel (A. 354), but also, and in particular, the extent of his mental impairment. Such items clearly were proper subjects of cross-examination (see Wigmore on *Evidence*, vol. III, 3d ed. §§ 931-932, 949, pp. 478-479, 499-504).

Toward the end of the recross-examination, sparked by Westerhausen's re-direct statements that he had recovered from his mental illness (A. 355), and after the government had elicited that his memory also was "better," Westerhausen was asked whether he now recalled killing his stepmother. Although the judge at first indicated he had not even heard the question, he sustained the objection that the question was improper and on request of the defense counsel admonished the jury to disregard it. The question was never answered and the government asked no further questions (A. 356-357). The court of appeals

Illinois, on an indictment<sup>2</sup> charging conspiracy to possess whiskey stolen from an interstate shipment and the substantive offense of possessing (on March 17, 1958) whiskey stolen from an interstate shipment, in violation of 18 U.S.C. 659 (A. 29-32).<sup>3</sup> Each was sentenced to imprisonment for five years and fined \$3,000 on the conspiracy count, and sentenced to a concurrent term of seven years on the substantive offense (A. 517-519). On appeal, a panel of the Seventh Circuit reversed the convictions on the ground that when the trial court, at the close of the government's case, announced that the evidence of acts and statements upon which ruling had been reserved were admissible against all defendants, it erred in stating to the jury that the court was satisfied that a connection existed between such acts and the defendants. However, on rehearing en banc, the court reversed its position and affirmed the convictions with one dissent.

The evidence<sup>4</sup> showed that on December 27, 1957, a truckload of "Old Sunnybrook" whiskey was sealed and driven from Louisville, Kentucky, to the dock of the Indianapolis Forwarding Company in Chicago, Illinois, where it was parked to await delivery to the

trial because of illness (A. 19, 110). Co-conspirator Frank (Hot Dog) Lisciandrello has not petitioned for a writ of certiorari.

<sup>2</sup>The indictment was returned in the Northern District of Illinois. The case was transferred for trial to the Southern District of Illinois on petitioner's motion for change of venue on the ground of adverse publicity (A. 15, see also A. 52-53).

<sup>3</sup>The narrative appendix prepared by petitioners for the court below will be referred to with the prefix "A."

<sup>4</sup>The court of appeals held unanimously that there was sufficient evidence to support the verdict as to each petitioner.

consignee; that the truck was subsequently stolen; and that on January 2, 1958, it was found empty in a vacant lot in Chicago (A. 491-494).

In January, petitioner Darlak told co-conspirator Covelli about the stolen whiskey and inquired whether it could be sold. Covelli said he did not think so because it was in half pints (A. 138). In late February or early March, Darlak again mentioned the whiskey and Covelli suggested they talk to co-conspirator Joseph Lisciaandrello. At a meeting that afternoon, Lisciaandrello said he would let them know after he got in touch with his partner, petitioner Allegritti (A. 139). Lisciaandrello, Darlak, Covelli, and Falzone finally agreed that the whiskey would be stored in the Café Continental, which was managed by Covelli and Falzone. They were to receive 25% of the whiskey as their share (A. 140). Covelli suggested to Falzone that they should transfer their share into empty gallons and sell it at the café (A. 140).

Part of the whiskey was slowly distributed throughout the district (A. 140). Covelli and petitioner Darlak delivered some of it to Ciro's Cocktail Lounge, where petitioner Allegritti directed its stacking. Allegritti told Darlak to send some to the "Front Page" (A. 141). Some was also delivered to the "Flame Lounge," which co-conspirator Joseph Lisciaandrello had taken over for a friend (A. 143). Meanwhile, Covelli and petitioner Darlak leased the "Silver Dome" at the suggestion of Joseph Lisciaandrello (A. 141-142). Co-conspirator Frank Lisciaandrello,

case, as it was in *Blumenthal*. The present attempt to read controlling significance into the exact wording of the trial court's charge in admitting the evidence during the trial is to magnify words out of all proportion to their importance in the setting of the trial as a whole. See *Glasser v. United States*, 315 U.S. 60, 83.<sup>5</sup>

2. Petitioners complain of the extent of the government's cross-examination of defense witness Robert Westerhausen (No. 924, pp. 19-25; No. 925, p. 9; No. 926, p. 9), who was offered in an attempt to impeach the co-defendant Covelli (see Statement, *supra*). That examination, however, was fully justified in light of the witness's unusual background. Westerhausen testified for the defense that he had met Covelli when they both were incarcerated at Leavenworth penitentiary, and that, during the discussions in prison, Covelli admitted giving the F.B.I. false information as to the identity of those involved in the whiskey conspiracy. Since he had affirmatively testified to meeting Covelli in the penitentiary, Westerhausen's criminal background was, of course, known to the jury even without cross-examination.

<sup>5</sup> Petitioner Allegritti's suggestion that this Court should review the grant of rehearing *en banc* (No. 924, pp. 16-19) presents no issue for this Court. It is wholly unwarranted to assume that six judges of the court of appeals have ruled to affirm this case solely because the defendants are notorious (No. 924, p. 19). The Seventh Circuit has not hesitated to reverse in notorious cases which it thought did not accord with the law. See *United States v. Accardo*, 298 F. 2d 133. The law in the circuit cannot be said to be confused in view of the present, authoritative *en banc* decision.

on the conspiracy issue. But in any case, any possible misunderstanding on that score was cured by the final instructions, which correctly informed the jury of the manner in which the evidence was to be considered.

Where the existence of a conspiracy must be proved by circumstances, it is manifestly impossible to get all the evidence in at the same time. And when, as here, the circumstances from which a conspiracy may be inferred consist in part of the acts of the various defendants, the proof which tends to show the existence of a conspiracy will at the same time show the participation of a particular defendant. Faced with that practical situation, a judge has two alternatives. He may at the outset allow proof of the acts of each of the parties in evidence against all, subject to having it stricken if the connection to the conspiracy is not shown; or he may allow it in evidence only against the person to whom it relates, subject to having it admitted against the others when sufficient proof had been adduced from which a jury could find that a conspiracy existed. The second method, the one employed here, was utilized by the trial court in *Blumenthal v. United States*, 332 U.S. 539, see fn. 9 p. 551, and an attack on that procedure (see briefs in Nos. 54-57, O.T. 1947) was not deemed by this Court worthy of comment. The significant question is whether the jury had the right to consider the evidence, and whether, when the time came for them to consider it, they were given proper instructions as to how to evaluate it. That was done in this

who managed the Silver Dome, used it as a further outlet for the stolen whiskey (A. 142).

On March 17, 1958, government agents raided and seized some of the stolen "Old Sunnybrook" whiskey at the Cafe Continental, Flame Tavern, and the Silver Dome Cafe (A. 143-144, 61-63, 64-66, 496-499). When petitioner Falzone was told that the Cafe Continental was being raided, he told Mr. Max Olshon "Boy we are in trouble. I got a basement full of hot whiskey and the officers are there" (A. 68). Later that evening, when Mr. Olshon talked to Falzone at the F.B.I. headquarters, Falzone gave him the keys to lock up the cafe and told Olshon to get rid of the whiskey from the walk-in box. Later that night Olshon destroyed 24 gallons of whiskey and gave one gallon away (A. 68-69). The following day Falzone told Olshon that the whiskey belonged to Allegretti and co-conspirator Joseph Lisciaandrello but that Allegretti would "straighten the whole case out for us" (A. 69).

Covelli left town after the raid and returned two weeks later. The conspirators raised funds which were given to Allegretti to "squash the beef"—i.e., so that there would be no loss of the business or other repercussions (A. 146-147).

#### ARGUMENT

1. All petitioners complain that the trial court erred in explaining to the jury its ruling that the acts and declarations of the co-defendants could be considered as evidence against all of the defendants, because the government had satisfied the court that a connection

existed between such acts and the several defendants (No. 924, pp. 11-16; No. 925, pp. 8-9; No. 926, pp. 8-9). We submit that in the context of this case no prejudice ensued from the particular choice of words used by the court.

In the course of the trial—as in many conspiracy cases—the court reserved ruling as to whether testimony concerning acts and statements of certain co-conspirators outside the presence of the others was admissible as evidence against the latter (see, e.g., A. 69). At the close of the government's direct case, the trial judge ruled outside the presence of the jury that the government had sustained its burden of proving a *prima facie* conspiracy and therefore the statements made by each defendant in furtherance of the conspiracy were admissible as evidence against all the defendants (A. 294-295). He subsequently explained to the jury that whereas he had previously reserved ruling upon the government's assertion that it would connect up the testimony (A. 296):

I now rule that the government has sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.

The trial judge told the jury that such evidence was now admissible against all defendants, whether or not present at the particular time the act was done or the statement was made (A. 296-297). Defense counsel's objection that this ruling invaded the province of the jury was overruled (A. 297-298). Subsequently the defense put on their case (A. 299-397) and the

parties submitted further evidence in rebuttal (A. 397-437).

In its charge to the jury on conspiracy (A. 437-442), the trial court carefully explained that the jury could not consider what other defendants had said in determining whether a particular defendant was a member of the conspiracy; that only after a defendant's membership in the conspiracy had been determined on the basis of other evidence could the statements of his co-conspirators made outside his presence and in furtherance of the conspiracy be considered against him (A. 441). The trial court also admonished the jury that any statement by the judge in ruling upon the admissibility of evidence was not to be considered as an expression by the court upon either the weight or the credibility of the evidence (A. 452).

It is plain that the trial court applied the proper standard in its ruling admitting the evidence (cf. Instruction No. 11 offered by defense (A. 479)). See *United States v. Dennis*, 183 F. 2d 201, 230-231 (C.A. 2), affirmed, 341 U.S. 494; *Carbo v. United States*, 314 F. 2d 718, 737 (C.A. 9), certiorari denied, 377 U.S. 953. The only question is whether the particular words used by the trial judge conveyed more than a ruling on evidence, and in fact told the jury that a conspiracy had been proved. We do not believe that a statement that a "connection" had been shown between the acts and statements and the defendants would in itself be understood by a jury to mean that a conspiracy had been proved, rather than merely that the evidence was admissible and relevant

F B I

Date: 6/29/65

Transmit the following in \_\_\_\_\_  
(Type in plain text or code)Via AIRTEL \_\_\_\_\_  
(Priority)

TO: DIRECTOR, FBI (15-38700)

FROM: SAC, CHICAGO (15-12848)

SUBJECT: GERALD COVELLI; ET AL  
TFIS - CONSPIRACY  
OOJ; BRIBERY;  
MISPRISON OF FELONY  
*grt*

Re Chicago airtel to Bureau 4/12/65.

JAMES ALLEGRETTI on this date appeared before U. S. District Court Judge GEORGE FREDERICK O. MERCER, Peoria, Ill., at which time he was remanded to the custody of the Attorney General for the prison term previously imposed by Judge MERCER.

3 - Bureau  
1 - Chicago  
BBB:BJK  
(4)

REC 44

15-38700-272

14 JUN 30 1965

Approved: *[Signature]*

Special Agent in Charge

Sent \_\_\_\_\_ M Per \_\_\_\_\_

292  
70 JUL 13 1965

JUL 1 1965

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

JUN 30 4 57 PM '65

F. B. I.  
U. S. DEPT. OF JUSTICE

F B I

Date: 7/9/65

Transmit the following in \_\_\_\_\_  
(Type in plaintext or code)Via A I R T E L \_\_\_\_\_  
(Priority)

TO : DIRECTOR, FBI (15-38700)

FROM : SAC, CHICAGO (15-12848)

SUBJECT: GERALD COVELLI,  
ET AL  
TFIS - CONSPIRACY;  
OOJ; BRIBERY  
MISPRISION OF FELONY

US Court of Appeals for 7th Circuit, Chicago, Illinois, issued a mandate on 6/1/65, to the US District Court, Peoria, Illinois, for the execution of the prison sentence to [redacted]

AUSA [redacted] Chicago, Illinois, advised that he had learned from defense attorney [redacted] that [redacted] is presently a patient in Presbyterian-St. Lukes Hospital, Chicago, Illinois, and made available a written authorization from [redacted] directed to hospital authorities and his doctors to release information and documents as to his medical condition. The records of the above named hospital reflect that [redacted] was admitted on 6/25/65. The following day he underwent surgery for esophagogsatrectomy. The primary diagnosis was cancer of the esophagus. The final pathological diagnosis is "poorly differentiated carcinoma in esophagus? adenocarcinoma? bronchogenic carcinoma, positive cell block". [redacted] has had several blood transfusions and his present condition is poor. Bureau will be advised of further developments.

- 385  
② - Bureau  
1 - Springfield (15-1943) (Info.)  
1 - Chicago

JJO:flk

Approved: [Signature]  
Special Agent in Charge

Sent \_\_\_\_\_ M Per [Signature]

REC 7 15-38700-273

4 JUL 12 1965

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7  
JUL 12 1965

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

JUL 12 3 36 PM '65

F. B. I.  
U. S. DEPT. OF JUSTICE

[REDACTED]

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b7C

Q

Q

AUG 1 1964  
Date AUG 1, 1964

☐ Check, when submitting semiannual inventory, if no previous correspondence with Bureau.

Bufile 15-33700 Field Division CHICAGO

Title and Character of Case

GERALD GOVILLA; [redacted]  
FUGITIVE; ETAL  
THIS - CONSPIRACY; COJ; INTERSECTION OF VELCHY

Date Property Acquired  
2/23/53

Source From Which Property Acquired

A wooden shed [redacted]

Location of Property or Bulky Exhibit

Bulky Exhibit Room

Reason for Retention of Property and Efforts Made to Dispose of Same

Evidence to be destroyed on completion  
of court action.

Description of Property or Exhibit and Identity of Agent Submitting Same

One empty Sunnybrook Whiskey carton which formerly contained  
half-pint bottle of Sunnybrook Whiskey.

Submitted by SA OTTO T. HANSEN, Jr.

SEMIANNUAL INVENTORY CERTIFICATION TO JUSTIFY  
RETENTION OF PROPERTY (Initial and date)

|       |       |            |                |
|-------|-------|------------|----------------|
| _____ | _____ | <u>200</u> | <u>7/15/65</u> |
| _____ | _____ | <u>28</u>  | <u>7/30/65</u> |
| _____ | _____ | _____      | _____          |

JHL/dmj  
(6)

15-38700  
NOT RECORDED

14 AUG 11 1965

Field File # 15-12342-157

57 AUG 16 1965

44 AUG 14 1965

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

AUG 13 5 10 PM '65

F. B. I.  
U. S. DEPT. OF JUSTICE

AUG 1 1964  
Date: August 1, 1964

☐ Check, when submitting semiannual inventory, if no previous correspondence with Bureau.

Bufile 15-33700 Field Division CHICAGO

Title and Character of Case GERALD COVELL;  
FUGITIVE; ET AL  
TRIS - CONSPIRACY; COJ; MISPRISION OF FELONY

Date Property Seized 2/25/63

Source From Which Property Seized Wooden shed

Location of Property or Bulky Exhibit  
Bulky Exhibit Room

Reason for Retention of Property and Efforts Made to Dispose of Same  
Evidence to be destroyed on completion of court action.

Description of Property or Exhibit and Identity of Agent Submitting Same

Submitted by SA OTTO T. HANDWERK

- 1 11 1/2" butcher knife, 7" stainless steel blade with wood handle, printed on blade "Goodell Company."
- 17 Pieces of brown cardboard with torn edges. Each piece contained black stencil printing "Gold Seal Liq's Chicago, Illinois"
- 17 Pieces of brown cardboard with torn edges. Each piece contained black stencilling "Whiskey" and each piece had a number as follows:

|           |           |           |          |
|-----------|-----------|-----------|----------|
| J 532024  | J 5320319 | J 532053  | J 532075 |
| J 5320411 | J 532067  | J 5320583 | J 532103 |
| J 532060  | J 5320726 | J 532106  | J 532301 |
|           |           | J 532066  | J 532056 |
|           |           | J 532087  | J 532100 |
|           |           | J 532560  |          |

NOT RECORDED

14 AUG 11 1965

SEMIANNUAL INVENTORY CERTIFICATION TO JUSTIFY  
RETENTION OF PROPERTY (Initial and date)

\_\_\_\_\_

2/13/65

REC. SUP.

\_\_\_\_\_

\_\_\_\_\_

EX

57 AUG 16 1965

27-10-1002

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

AUG 13 5 10 PM '65

F. B. I.  
U. S. DEPT. OF JUSTICE

UNITED STATES GOVERNMENT

# Memorandum

TO : DIRECTOR, FBI (15-38700)

DATE: 8/10/65

FROM : SAC, CHICAGO (15-12848)

SUBJECT: GERALD COVELLI; ET AL  
TFIS - CONSPIRACY;  
OOJ; BRIBERY;  
MISPRISION OF FELONY

Remyairtel dated 7/9/65.

On 7/20/65, [redacted] was released from Presbyterian St. Luke's Hospital, Chicago, Illinois. b6 b7C

In response to an FBI inquiry, [redacted] submitted a letter to the Chicago Office reflecting the present condition of [redacted] and plans for a subsequent operation in the next two or three months. Copy of this letter enclosed for the Bureau. This information is being brought to the attention of AUSA [redacted] Chicago, who is following this matter to determine when [redacted] will be available to begin serving his Federal prison sentence. b6 b7C

Inasmuch as all prosecutive action has been completed and in view of the above, this case is being closed in the Chicago Division.

(2) - Bureau (Encl. - 1)  
1 - Chicago  
JJO:BJK  
(3)

ENCLOSURE

REC-70 1/24/65

EX-105 EN 25 AUG 12 1965

51 AUG 18 1965

F. B. I.  
U. S. DEPT. OF JUSTICE

ENCLOSURE

( )

[illegible][illegible]

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[REDACTED]

RECEIVED: 1970-10-10

EXCISE :-

JOHN : 10-11-1910

**DYLE:**

WISCONSIN  
 PUBLIC UTILITY COMMISSION  
 STAFF REPORT  
 PUBLIC UTILITY EDITORIAL  
 AND REPORTING SERVICE  
 1980-1981

## FEDERAL BUREAU OF INVESTIGATION

|   |                                    |  |  |
|---|------------------------------------|--|--|
| REPORTING OFFICE<br><b>Springfield</b>            | OFFICE OF ORIGIN<br><b>Chicago</b> | DATE<br><b>4/30/66</b>   | INVESTIGATIVE PERIOD<br><b>2/9 - 4/25/66</b> |
| TITLE OF CASE<br><b>GERALD COVELLI;<br/>ET AL</b> |                                    | REPORT MADE BY<br><b>SA MARCUS E. SHARPE</b>   | TYPED BY<br><b>kwh</b>                       |
|   |                                    | CHARACTER OF CASE<br><b>TFIS - CONSPIRACY; OOJ;<br/>BRIBERY; MISPRISON OF FELONY</b> |  |

## REFERENCE:

Springfield letter to Chicago, 2/25/66. (IO)  
Chicago letter to Springfield, 3/31/66. (IO)

P.

## LEADS:

## SPRINGFIELD DIVISION

Will follow and report final court action against  
defendant [redacted] in Northern Division, Southern District  
of Illinois, at Peoria, Illinois.

b6  
b7C

Case has been: Pending over one year ☐ Yes ☐ No; Pending prosecution over six months ☐ Yes ☐ No

APPROVED: *RSH*SPECIAL AGENT  
IN CHARGE

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- 1 - USA, Springfield
- 3 - Chicago (15-12848)  
(1: USA, Chicago)
- 2 - Springfield (15-1943)

|              |       |     |        |
|--------------|-------|-----|--------|
| 15           | 38700 | 275 | REC 45 |
|              |       |     | EX-104 |
| 5 MAY 3 1966 |       |     |        |
|              |       |     |        |

## Dissemination Record of Attached Report

Notations

|               |    |             |       |      |
|---------------|----|-------------|-------|------|
| Agency        |    |             |       |      |
| Request Recd. |    |             |       |      |
| Date Fwd.     | 53 | MAY 11 1966 |       |      |
| How Fwd.      |    |             | COVER | PAGE |
| By            |    |             |       |      |

*SIX*  
*STAT SECT.*

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

MAY 9 11 48 AM '66

1 - (T: DEPT OF JUSTICE)  
2 - (T: DEPT OF JUSTICE)  
3 - (T: DEPT OF JUSTICE)  
4 - (T: DEPT OF JUSTICE)

EX 107

OF THE DEPT OF JUSTICE  
RECEIVED  
MAY 10 1966  
FBI DEPT OF JUSTICE

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MAY 10 1966

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

Copy to: 1 - USA, Springfield  
1 - USA, Chicago

Report of: SA MARCUS E. SHARPE  
Date: April 30, 1966

Office: Springfield

Field Office File #: SI 15-1943

Bureau File #: 15-38700

Title: GERALD COVELLI;  
ET AL

Character: THEFT FROM INTERSTATE SHIPMENT - CONSPIRACY;  
OBSTRUCTION OF JUSTICE; BRIBERY; MISPRISON OF  
Synopsis: FELONY

USA, SDI, on 2/9/66 advised motion filed by attorney for defendant [redacted] requesting stay of mittimus until 3/1/66, still pending. USA, SDI, requested physical condition [redacted] be ascertained in view of possible new motion to further stay the mittimus. Physician for [redacted]

[redacted] 7/2/65 and 9/28/65, and [redacted] doing well but condition of patient should be followed at three-months intervals for years. AUSA, ND, SDI, Peoria, Illinois, on 4/25/66 advised [redacted] execution of sentence was stayed to 3/1/66 and he has not appeared to start service.

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SI 15-1943

DETAILS:

AT PEORIA, ILLINOIS

The following investigation was conducted by  
SA [redacted] on February 9, 1966:

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United States Attorney [redacted]  
Southern District of Illinois, Springfield, Illinois,  
telephonically advised that the motion filed by [redacted]  
[redacted] the attorney [redacted] requesting  
a stay of the mittimus until March 1, 1966, was still  
pending before the court. He advised that due to the  
present date, the motion was practically ineffective inasmuch  
as the mittimus was requested stayed until March 1, 1966  
but he would still attempt to have the motion before the  
court. He advised, also, that in view of the probability  
of a new motion to stay the mittimus, he would like to  
have the FBI ascertain the present physical condition of  
[redacted] and the diagnosis of the doctor as to the  
[redacted] future medical condition.

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On February 25, 1966, the above data was brought  
to the attention of the Chicago Division, with a request  
that Chicago attempt to ascertain the present physical  
condition of [redacted] as well as to any information  
which could be developed as to his future medical condition  
and to the possibility of his being brought into court for  
execution of the mittimus.

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On March 31, 1966, the Chicago Division furnished  
the following-quoted letter from Doctor [redacted]  
MD, Chicago, Illinois, the original of which was furnished  
the Springfield Division and is being retained as an exhibit  
to the file:

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# FEDERAL BUREAU OF INVESTIGATION

|   |                                    |  |  |
|---|------------------------------------|--|--|
| REPORTING OFFICE<br><b>SPRINGFIELD</b>            | OFFICE OF ORIGIN<br><b>CHICAGO</b> | DATE<br><b>6/7/66</b>  | INVESTIGATIVE PERIOD<br><b>5/31/66</b> |
| TITLE OF CASE<br><b>GERALD COVELLI;<br/>ET AL</b> |                                    | REPORT MADE BY<br><b>SA MARCUS E. SHARPE</b>   | TYPED BY<br><b>dm</b>                  |
|   |                                    | CHARACTER OF CASE<br><br><b>TFIS - CONSPIRACY; OOJ;<br/>BRIBERY; MISPRISON OF FELONY</b> |  |

REFERENCE:

Report of SA MARCUS E. SHARPE, Springfield,  
April 30, 1966;

- P -

LEADS:            SPRINGFIELD DIVISION  
                      AT PEORIA, ILLINOIS

Will follow and report final court action against  
the defendant [redacted] in USDC, Northern Division, Southern  
District of Illinois, at Peoria, Illinois.

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b7C

Case has been: Pending over one year ☐ Yes ☐ No; Pending prosecution over six months ☐ Yes ☐ No

APPROVED

SPECIAL AGENT  
IN CHARGE

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- 3 - Chicago (15-12848)
- (1: USA, Chicago)
- 2 - Springfield (15-1943)

15-38700-276

REC-49

18 JUN '8 1966

Dissemination Record of Attached Report

Notations

Agency

Request Recd.

Date Fwd.

How Fwd.

By

COVER A\* PAGE

50 JUN 21 1966

STAT. SECT.



SI 15-1943

AT PEORIA, ILLINOIS

On April 25, 1966, this information as to the professional medical opinion of Doctor [redacted] as to the condition of [redacted] was brought to the attention of Assistant United States Attorney [redacted] Northern Division, Southern District of Illinois.

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[redacted] stated that insofar as his office was concerned, he knew that the execution of the sentence of defendant [redacted] had been stayed until March 1, 1966.

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[redacted] stated that there has apparently been no further court action taken in this matter, and he will determine what further action is necessary as he is of the opinion that defendant [redacted] has not appeared to start the service of his sentence.

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b7C

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

Copy to: 1 - USA, SPRINGFIELD, ILLINOIS  
1 - USA, CHICAGO, ILLINOIS

Report of: SA MARCUS E. SHARPE  
Date: 6/7/66

Office: SPRINGFIELD

Field Office File #: SI 15-1943

Bureau File #: 15-38700

Title: GERALD COVELLI;  
ET AL

Character: THEFT FROM INTERSTATE SHIPMENT - CONSPIRACY;  
OBSTRUCTION OF JUSTICE; BRIBERY; MISPRISON OF  
FELONY

## Synopsis:

Hearing on motion of defendant [REDACTED] too  
"stay the mittimus" set for June 6, 1966, 10:00 AM,  
USDC, Northern Division, Southern District of Illinois,,  
Peoria, Illinois.

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- P -

SI 15-1943

DETAILS:

AT PEORIA, ILLINOIS

On May 31, 1966, [REDACTED]  
Secretary, Office of Assistant United States Attorney  
for the Northern Division, Southern District of Illinois,  
made available the file of that office pertaining to this  
pending matter.

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It was noted that in connection with the motion  
of defendant [REDACTED] to "Stay the mittimus" which  
had been previously filed, that a hearing on said motion  
by defendant [REDACTED] has been set for 10:00 AM,  
June 6, 1966 in the United States District Court, for the  
Northern Division, Southern District of Illinois, Peoria,  
Illinois.

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There was no further action noted upon a review  
of the file.

# FEDERAL BUREAU OF INVESTIGATION

|   |                                    |  |  |
|---|------------------------------------|--|--|
| REPORTING OFFICE<br><b>SPRINGFIELD</b>            | OFFICE OF ORIGIN<br><b>CHICAGO</b> | DATE<br><b>7/29/66</b>   | INVESTIGATIVE PERIOD<br><b>7/26/66</b> |
| TITLE OF CASE<br><b>GERALD COVELLI;<br/>ET AL</b> |                                    | REPORT MADE BY<br><b>SA MARCUS E. SHARPE</b>   | TYPED BY<br><b>fjh</b>                 |
|   |                                    | CHARACTER OF CASE<br><br><b>TFIS - CONSPIRACY; OOJ;<br/>BRIBERY; MISPRISON OF FELONY</b> |  |

REFERENCE: Report of SA MARCUS E. SHARPE, Springfield, 6/7/66.

- RUC -

LEADS:

CHICAGO DIVISION

At Chicago, Illinois

Chicago may desire to follow and report efforts of the U.S. Attorney, Chicago, to collect \$3,000 fine imposed upon each of the defendants, that is, JAMES ALLEGRETTI, [REDACTED] and FRANK LISCIANDRELLO, as same to be administered by U.S. Attorney, Chicago, Civil Division-Fines and Collection Section.

Case has been: Pending over one year ☐ Yes ☐ No; Pending prosecution over six months ☐ Yes ☐ No

APPROVED

SPECIAL AGENT  
IN CHARGE

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 1 - Springfield (15-1943)

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| 15-38700-277 | REC- 39 |
| 8 AUG 4 1966 |         |

| Dissemination Record of Attached Report |               |          |         |    |
|---|---------------|----------|---------|----|
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Notations

**STAT. SECT.**

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F.B.I.

DEPT. OF JUSTICE

1 - DIRECTOR, (157-1073)  
2 - SAC, CHICAGO (157-1073) (P: 157-1073)  
1 - ASST. DIR., (157-1073)  
1 - CHIEF, (157-1073)

REC-3

CHICAGO: CHIEF, CHICAGO-CHICAGO and collection section.  
and CHICAGO CHICAGO-CHICAGO, as well as to be a representative of the  
each of the collection, that is, under the collection, [redacted]  
the [redacted] section, CHICAGO, to collect [redacted] the [redacted] and  
CHICAGO and [redacted] to collect the [redacted] and [redacted] of

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UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

## Copy to:

1 - USA, SPRINGFIELD  
1 - USA, CHICAGO

## Report of:

SA MARCUS E. SHARPE

## Office:

SPRINGFIELD

## Date:

July 29, 1966

## Field Office File #:

SI 15-1943

## Bureau File #:

15-38700

## Title:

GERALD COVELLI;  
ET AL

## Character:

THEFT FROM INTERSTATE SHIPMENT - CONSPIRACY;  
OBSTRUCTION OF JUSTICE; BRIBERY; MISPRISON OF FELONY

## Synopsis:

Defendant [redacted] present in U.S. District Court, Northern Division, Southern District of Illinois, Peoria, Illinois, 6/6/66, represented by counsel. At conclusion of hearing on defendant's motion for Stay of Execution, 6/6/66, the motion was denied. On 6/6/66 the court ordered the defendant be delivered to the custody of the U.S. Marshal. U.S. Marshal delivered defendant to custody U.S. Medical Center, Springfield, Missouri, 6/7/66. U.S. Attorney, Southern District of Illinois, transferred to U.S. Attorney, Northern District of Illinois, Chicago, responsibility for collection of fines of \$3,000 each from defendants JAMES ALLEGRETTI, [redacted] and FRANK LISCIANDRELLO.

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- RUC -

SI 15-1943

DETAILS:

AT PEORIA, ILLINOIS

On July 26, 1966, Assistant U.S. Attorney [redacted] advised that defendant [redacted] had been present in open court for the U.S. District Court for the Northern Division, Southern District of Illinois, at Peoria, early in June, 1966, at which time a motion for a stay of execution was denied by the presiding Judge, the Honorable OMER POOS, and that the defendant [redacted] had been ordered to serve his sentence and that the U.S. Marshal had been directed to take custody of the defendant [redacted]. [redacted] stated that much of the file in instant matter had been returned to the U.S. Attorney in Chicago and did not have the exact dates available of this action.

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He did advise that on July 13, 1966, that his office addressed a letter in this matter to the Honorable EDWARD V. HANRAHAN, U.S. Attorney, Northern District of Illinois, Chicago, Illinois. He stated his office pointed out to the office of the U.S. Attorney in Chicago that the fines imposed in the amount of \$3,000 each against defendants JAMES ALLEGRETTI, [redacted] and FRANK LISCIANDRELLO were still outstanding.

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He advised that his office was transferring to the office of the U.S. Attorney, Chicago, Civil Division-Fines Collection Section, the administration of the collection of \$3,000 fine from each of the defendants as the defendants do not reside in the Southern District of Illinois.

[redacted] advised that the criminal docket number in this matter is CR3888 and that the date of recent action of the court in regard to [redacted] would be a matter of record in the office of the clerk of the court.

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On July 26, 1966, [redacted] Clerk, U.S. District Court Clerk's Office, Northern Division, Southern District of Illinois, at Peoria, advised that under this matter, the record reflects that defendant [redacted] was present in open court with counsel on June 6, 1966, for the purpose of being present for a hearing on the motion by defendant [redacted] for stay of execution.

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b7C

SI 15-1943

The Honorable OMER POOS was the presiding Judge. The record reflects that the court, having heard the evidence, adduced herein on the part of said defendant and arguments of counsel, denied the said motion on June 6, 1966, and entered an order that the defendant be delivered to the custody of the U.S. Marshal. The record indicated that the court recommended the defendant be committed to the U.S. Medical Center, Springfield, Missouri.

The final entry in this matter in the records of the clerk reflect that on June 10, 1966, a certified copy of the judgment and commitment was filed June 7, 1966, and that the U.S. Marshal entered a return indicating that defendant [redacted] had been delivered to the custody of the Attorney General by placing him in the U.S. Medical Center, Springfield, Missouri, June 7, 1966.

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11/10/66  
C-15  
P-10/10/66  
sure

TELETYPE UNIT  
OCT 31 1966  
ENCODED MESSAGE

|              |       |
|--------------|-------|
| Mr. Tolson   | _____ |
| Mr. DeLoach  | _____ |
| Mr. Mohr     | _____ |
| Mr. Wick     | _____ |
| Mr. Casper   | _____ |
| Mr. Callahan | _____ |
| Mr. Conrad   | _____ |
| Mr. Felt     | _____ |
| Mr. Gale     | _____ |
| Mr. Rosen    | _____ |
| Mr. Sullivan | _____ |
| Mr. Tavel    | _____ |
| Mr. Trotter  | _____ |
| Tele. Room   | _____ |
| Miss Holmes  | _____ |
| Miss Gandy   | _____ |

Shy

WA-2- 4:00 PM CST EH

WIRSENT 10-31-66 EH

TO DIRECTOR (15-38700) ATTN: ASSISTANT DIRECTOR ROSEN  
FROM CHICAGO (15-12848)

RECEIVED  
OCT 31 1966  
FBI  
U.S. DEPT. OF JUSTICE

GERALD COVELLI; ET AL. TFIS - CONSPIRACY; OBSTRUCTION  
OF JUSTICE; BRIBERY; MISPRISON OF FELONY.

REMYAIRTEL DATED OCTOBER TWENTYSIX LAST.

JOHN NEWBOLD, ILLINOIS STATE POLICE, ADVISED ON OCTOBER  
THIRTYONE INSTANT, FOR SECURITY REASONS  NOT BE  
REMOVED FROM PRISON AND UTILIZED IN SEARCH UNTIL WEDNESDAY,  
NOVEMBER TWO NEXT.

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B  
C

CHICAGO FOLLOWING CLOSELY AND BUREAU WILL BE KEPT ADVISED  
OF DEVELOPMENTS.

END

REY

FBI WASH DC

REC 36

15-38700-278

NOV 2 1966

61 NOV 15 1966

cc - Bunker

FBI WASH DC

REY

END

OF DEVELOPMENTS.

CHICAGO FOLLOWING CLOSELY AND BUREAU WILL BE KEPT ADVISED  
NOVEMBER TWO NEXT.

REMOVED FROM PRISON AND UTILIZED IN SEARCH UNIT WEDNESDAY.

INVESTIGATIVE INSTANT FOR SECURITY REASON [ ] NOT BE

WHEN REBORN, ILLINOIS STATE POLICE, ADVISED ON OCTOBER  
BY TELETYPE  
TO ADVISOR DATED OCTOBER TWENTYSIX LAST.

TO POLICE: BRIBERY; MISPRISON OF PRISON.

GENERAL COVERED: ET AL. THIS - CONSPIRACY: OBSTRUCTION

FROM CHICAGO (12-15848)

TO DIRECTOR (12-38100) WITH: ASSISTANT DIRECTOR

URGENT 10-21-66 EH

-S- AW 100 PM CST EH

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION 5710  
OCT 31 6 07 PM '66  
F. B. I.  
U. S. DEPT. OF JUSTICE

CODING UNIT  
OCT 31 5 17 PM '66  
FBI WASH DC

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62 NOV 11 1966

TELETYPE UNIT  
NOV 2 1966  
ENCODED MESSAGE

|              |       |
|--------------|-------|
| Mr. Tolson   | _____ |
| Mr. DeLoach  | _____ |
| Mr. Mohr     | _____ |
| Mr. Wick     | _____ |
| Mr. Casper   | _____ |
| Mr. Callahan | _____ |
| Mr. Conrad   | _____ |
| Mr. Felt     | _____ |
| Mr. Gale     | _____ |
| Mr. Rosen    | _____ |
| Mr. Sullivan | _____ |
| Mr. Tavel    | _____ |
| Mr. Trotter  | _____ |
| Tele. Room   | _____ |
| Miss Holmes  | _____ |
| Miss Gandy   | _____ |

WA -2- 4:20 PM CDT MQ  
URGENT 11-2-66 EH  
TO DIRECTOR (15-38700)  
FROM CHICAGO (15-12848)

*pkc*  
*sh/d*

GERALD COVELLI, ET AL, ~~IFIS~~ CONSPIRACY;  
OBSTRUCTION OF JUSTICE; BRIBERY; MISPRISON OF FELONY.  
REMYAIRTEL OCT. TWENTY SIX, LAST AND MYTEL, OCT.  
THIRTYONE, LAST.

*Bufile*

*McAndrew*  
*Shaffer*  
*Leigh*

[ ] DATE IN CUSTODY OF STATE AUTHORITIES  
AND ACCOMPANIED BY CHICAGO SAS, [ ]

*gjd*

[ ]  
[ ] DUE TO SNOW COVER.

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ON GROUND, UNABLE TO CONDUCT ADEQUATE SEARCH FOR

[ ] UPON MELTING OF SNOW, ORGANIZED SEARCH  
WILL BE CONDUCTED. CHICAGO FEELS DUE TO LAND MARKS  
MENTIONED [ ] <sup>EV</sup> PRBBIOUS TO ARRIVAL AT THESE MARKS, [ ]  
RE SITE RELIABLE.

*L*

END AND ACK K

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FBI WASH DC

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NOV 2 11 30 AM '66

REC-11

15-38700-279

NOV 5 8 08 PM '66

NOV 8 1966

*3249*  
*64*  
*279*

62 NOV 16 1966

cc - Bunker

RECEIVED-GALE

Nov 3 11 36 AM '66

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U.S. DEPT. OF JUSTICE

FBI WASH DC

S AND I FOR ALL

**M20**

END AND ACK K

BE SIDE BEIABLE.

MENTIONED [REDACTED] SUBBIONS TO ARRIVAL AT THESE MARKS.

WILL BE CONDUCTED. CHICAGO FEELS ONE TO FIVE WEEKS

~~GRAVE SITE~~ • UPON MELTING OF SNOW, ORGANIZED SEARCH

ON GROUND, HAVE TO CONDUCT ADEQUATE SEARCH FOR

DNE IO ZHOM COLEB

~~MURDER CRONE~~

AND ACCOMPANIED BY CHICAGO 242.

|  |                                      |
|--|--------------------------------------|
|  | DATE IN CUSTODY OF STATE AUTHORITIES |
|--|--------------------------------------|

THIRTYONE' LAST.

BEWAARBIET OCT. TWENTY SIX, LAST AND WATER, OCT.

OBSTRUCTION OF JUSTICE; BRIBERY; MISPRISON OF FELONY.

СЕРЬОЗ СОЛЛЕГІ, ЕІ УГ' ІЕІЗН- СОНЗІВАСА:

LEON CHICAGO (12-15848)

TO DIRECTOR (12-28100)

ЗНАЧЕНИИ 11-5-00 ЕН

NO CDJ MW 4:50 -S- MW

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION 5710

Nov 2 6 08 PM '66

F.B.I. F.B.I. S.T.  
U.S. DEPT. OF JUSTICE U.S. DEPT. OF JUSTICE

Nov 3 1 29 PM '66

CRIMINAL INTELLIGENCE DIVISION

NOV 2 5 25 PM '66

CODING UNIT

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F B I

Date: 10/26/66

Transmit the following in \_\_\_\_\_  
(Type in plaintext or code)Via AIRTEL \_\_\_\_\_  
(Priority)

TO : DIRECTOR, FBI (15-38700)  
FROM : SAC, CHICAGO (15-12848)  
SUBJECT: GERALD COVELLI

JAMES ALLEGRETTI;  
ET AL  
TFIS - CONSPIRACY; OBSTRUCTION  
OF JUSTICE; BRIBERY; MISPRISION  
OF FELONY

As the Bureau is aware, captioned case involved lengthy investigation concerning the theft of a truck load of whiskey, part of which was found in the possession of ALLEGRETTI, a Chicago top hoodlum, and other well known Chicago hoodlums.

Following the original trial in this case, information was received that \_\_\_\_\_  
\_\_\_\_\_ on 7/16/59 \_\_\_\_\_

\_\_\_\_\_ and  
\_\_\_\_\_ COVELLI, were indicted by a Federal  
Grand Jury in Chicago for bribery. \_\_\_\_\_ attorney,

REC 46 15-38700-280

3 - Bureau (AMSD)  
2 - Chicago  
(1 - \_\_\_\_\_)

MHM/rms  
(5)

12 NOV 15 1966

-114

memo Rosin to DeLoach  
10/28/66  
LHB:iml

55 NOV 22 1966  
Special Agent in Charge

Sent \_\_\_\_\_ M Per \_\_\_\_\_

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REC'D - ROSEN  
FBI

OCT 28 6 15 PM '68

OCT 23 8 39 AM '68

(2)  
100-442

1 - Chicago  
2 - Bureau (100-442)

b7D

CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED] RE: [REDACTED]  
[REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]

[REDACTED]

b6  
b7C

REPLY TO CHICAGO TELETYPE FOR REPLY: [REDACTED]

CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]

RE: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]

CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]  
RE: [REDACTED] CHICAGO TELETYPE TO BUREAU FOR REPLY: [REDACTED]

RE: [REDACTED]

RE: [REDACTED]

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CG 15-12848

in a superseding indictment, was also included as a conspirator in the attempted bribery.

On 3/22/60, [redacted] left his Chicago residence to go to work and has not been seen since. A bench warrant was subsequently issued on 4/29/60. A lengthy fugitive investigation was conducted in this case. He was never located. It was theorized that being the link in the conspiracy charge, there could be no successful prosecution without his presence, and that he had been murdered by the "outfit." Defendants in this case were subsequently convicted and sentenced, which convictions were upheld by the United States Supreme Court.

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On 3/23/64, on motion of the Government, after receiving approval of the Department, the indictment regarding [redacted] was dismissed in the U.S. District Court, Chicago.

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On 11/30/60, [redacted] appeared in U.S. District Court, Chicago, entered a plea of nolle contender to this charge. He was placed on one year probation, which sentence was later reduced to 30 days suspended.

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On 10/18/66, SA [redacted] accompanied by SA [redacted] interviewed [redacted]

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[redacted] This interview was made at the request of [redacted] who advised that [redacted] criminal associates [redacted]

[redacted] said that sometime in [redacted] the exact date he does not recall, he received a telephone call from [redacted] who is

CG 15-12848

currently serving a term at [redacted] after  
[redacted] to get a  
[redacted] said he met  
[redacted] was accompanied by [redacted]  
currently serving a term at [redacted]  
[redacted] and [redacted]  
described as [redacted] who was  
involved in [redacted] He stated that [redacted] the  
[redacted] was not aware of what was  
going on and thought that he was [redacted] and  
[redacted] He stated that [redacted] then told him  
[redacted] that he wanted [redacted]  
[redacted] He stated [redacted]  
[redacted] area of [redacted]  
[redacted] He said that [redacted] was still not aware of  
what was going on [redacted]  
[redacted] He said that either [redacted]  
[redacted] He stated that they then came back to  
[redacted] He stated he had not  
accompanied them [redacted]  
[redacted] He said that [redacted] gave  
[redacted] He  
stated that [redacted]  
[redacted] known to the Chicago Office, and [redacted]  
[redacted] He stated that to the best of his  
knowledge, [redacted] He described  
[redacted] He said  
that shortly thereafter, [redacted]  
[redacted] and he  
[redacted]

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CG 15-12848

JOHN NEWBOLD, former Bureau Agent, Chief of the Crime Section, Illinois State Police, was contacted and advised that he was making arrangements to get [redacted] on Monday, 10/31/66, in order that [redacted]

He stated that extreme security measures were being taken, and that [redacted] under the [redacted]

It is noted that [redacted] had [redacted] as a result of [redacted] NEWBOLD said that the Illinois State Police had an interest in this matter inasmuch as the [redacted] occurred in the State of Illinois, exact location not known.

The Chicago Office plans to utilize Agent coverage in the search by the Illinois State Police [redacted]

It is realized that inasmuch [redacted]

[redacted] there is a remote possibility of [redacted] however, it is felt that due to the importance of this matter, and the fact that [redacted] in the U.S. District Court in an Obstruction of Justice case, this matter should be closely followed by the Chicago Office. It is believed [redacted] and evidence against [redacted] can be developed, even though not sufficient for a prosecutable case, the Chicago Office will be in a position to utilize this information to great advantage in investigation of the Chicago crime syndicate. The possibility also exists this may be a lever in developing information concerning other unsolved gangland killings in the Chicago area.

The Agents will, UACB, be on the scene as observers with the complete understanding of NEWBOLD and other State Police officials, that the Bureau Agents will have no responsibility for the security of the [redacted]

CG 15-12848

It is noted that [redacted]  
[redacted] if this matter should [redacted]  
[redacted] especially inasmuch as [redacted] is currently  
serving time [redacted] and Chicago is  
keeping this matter in the strictest confidence.

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NEWBOLD has advised that [redacted]  
he does not contemplate pursuing the matter further [redacted]  
absence [redacted]

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UNITED STATES GOVERNMENT

# Memorandum

TO : Mr. DeLoach

DATE: October 28, 1966

FROM : A. Rosen

- 1 - Mr. DeLoach
- 1 - Mr. Rosen
- 1 - Mr. Malley
- 1 - Mr. Shroder
- 1 - Mr. Bunker
- 1 - Mr. Gale
- 1 - Mr. McAndrews

Tolson \_\_\_\_\_  
DeLoach \_\_\_\_\_  
Mohr \_\_\_\_\_  
Wick \_\_\_\_\_  
Casper \_\_\_\_\_  
Callahan \_\_\_\_\_  
Conrad \_\_\_\_\_  
Felt \_\_\_\_\_  
Gale \_\_\_\_\_  
Rosen \_\_\_\_\_  
Sullivan \_\_\_\_\_  
Tavel \_\_\_\_\_  
Trotter \_\_\_\_\_  
Tele. Room \_\_\_\_\_  
Holmes \_\_\_\_\_  
Gandy \_\_\_\_\_

SUBJECT: GERALD COVELLI, ET AL  
THEFT FROM INTERSTATE SHIPMENT -  
CONSPIRACY; OBSTRUCTION OF JUSTICE;  
BRIBERY; MISPRISON OF FELONY

## PURPOSE

To advise of action contemplated on information  
obtained from [redacted]

## BACKGROUND

In this case 5 subjects, all with Chicago hoodlum connections were convicted in April, 1962, for their part in the December, 1957, theft of 875 cases of whiskey which was in interstate shipment. Conviction was had at second trial of matter. The first trial in January, 1959, having resulted in mis-trial when jury unable to arrive at verdict. Subsequent to first trial it developed that [redacted]

[redacted] a bench warrant was issued for him and a lengthy fugitive investigation conducted. He was never located and it was [redacted] In March, 1964, with Department approval the Government dismissed the indictment which had been obtained against [redacted]

## CURRENT DEVELOPMENTS

On October 18, 1966, [redacted] was contacted by 2 Chicago Agents. [redacted] says [redacted]

CONTINUED - OVER

55 NOV 22 1966

15-38700

12 NOV 15 1966

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FBI  
U.S. DEPT. OF JUSTICE  
Oct 31 5 16 PM '66

FBI  
U.S. DEPT. OF JUSTICE  
REC'D - ROSEN  
RECEIVED FBI  
GENERAL INVESTIGATIVE  
DIVISION  
Nov 9 12 18 PM '66  
Nov 9 1 18 PM '66  
Nov 9 1 18 PM '66

[Redacted]  
SPE [Redacted]  
DIVISION OF DE LOACH SPECIAL DIVISION F B I  
F B I  
JUL 11 12 44 PM '66

Nov 11 5 23 PM '66  
[Redacted]

[Redacted]

Nov 11 5 23 PM '66  
RECEIVED FBI  
GENERAL INVESTIGATIVE  
DIVISION  
JUL 11 12 44 PM '66

[Redacted]

Nov 11 5 23 PM '66  
RECEIVED FBI  
GENERAL INVESTIGATIVE  
DIVISION  
JUL 11 12 44 PM '66

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D.C. 20535  
[Redacted]

- 1 - Mr. Tolson
- 1 - Mr. DeLoach
- 1 - Mr. Mohr
- 1 - Mr. Bishop
- 1 - Mr. Casper
- 1 - Mr. Callahan
- 1 - Mr. Conrad
- 1 - Mr. Felt
- 1 - Mr. Gale
- 1 - Mr. Rosen
- 1 - Mr. Sullivan
- 1 - Mr. Tavel
- 1 - Mr. Trotter
- 1 - Tele. Room
- 1 - Miss Holmes
- 1 - Miss Gandy

8

8

Memorandum to Mr. DeLoach  
RE: GERALD COVELLI

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[redacted] He related that  
sometime (exact date not recalled) in [redacted]  
[redacted] (who are both currently in prison)

[redacted]  
[redacted]  
[redacted] According [redacted]  
[redacted] during this incident and after  
[redacted]

John Newbold (former Bureau Agent), Chief, Crime  
Section, Illinois State Police, is aware [redacted] disclosure  
and plans [redacted] Prison on Monday, October 31,  
1966, [redacted]  
Newbold is exercising extreme security measures in connection  
with this and stated that the Illinois State Police have an  
interest since [redacted]  
occurred in the State of Illinois.

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The Chicago Office plans to be on the scene as observers  
in connection with the search contemplated by Newbold.

ACTION

Any possible Federal prosecution under the Obstruction  
of Justice Statute in connection with the above would be  
barred by the Statute of Limitations. This matter has been  
discussed with the Special Investigative Division and they  
concur with the observations of Special Agent in Charge,  
Chicago, [redacted] that [redacted] information  
which can be used to great advantage by Chicago in the investiga-  
tion of the Chicago Crime syndicate ~~may~~ develop. In view  
of this the presence of Chicago Agents on the scene as  
observers is justified (it being noted that the responsibility  
for [redacted] rests with the Illinois State  
Police). Chicago will keep the Bureau advised of developments.

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*[Handwritten signatures and initials]*  
JH  
RPM  
- 6 -  
AN  
GRC  
JH

F B I

Date: 11/21/66

Transmit the following in \_\_\_\_\_  
(Type in plaintext or code)Via AIRTEL \_\_\_\_\_  
(Priority)

TO : DIRECTOR, FBI (15-38700)

FROM : SAC, CHICAGO (15-12848)

SUBJECT: GERALD COVELLI;  
[REDACTED]

JAMES ALLEGRETTI;

ET AL

TFIS - CONSPIRACY; OBSTRUCTION  
OF JUSTICE; BRIBERY; MISPRISON  
OF FELONY

Remy airtel 10/26/66. 11-30

Organized search conducted 11/18/66, by Illinois State Police with Buagents and representative from Dupage County Sheriff, who has jurisdiction in forest preserve, present. Search negative and JOHN NEWBOLD, Chief of Crime Section, Illinois State Police, stated no further efforts will be made [REDACTED] unless more specific information as to [REDACTED] developed.

Chicago recontacting [REDACTED]

REC-19

15-38700-282

(3) - Bureau  
1 - ChicagoCAA:mlh,pt  
(4)

62 DEC 2 1966

NOV 22 1966

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b7DApproved: \_\_\_\_\_ Sent \_\_\_\_\_ M Per \_\_\_\_\_  
Special Agent in Charge

CRIMINAL INTELLIGENCE SECTION  
SPECIAL INVESTIGATIVE DIVISION

Nov 23 9 40 AM '66

F. B. I.  
U. S. DEPT. OF JUSTICE

FBI  
U. S. DEPT. OF JUSTICE

Nov 23 9 10 AM '66

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F. B. I.  
U. S. DEPT. OF JUSTICE

NOV 23 1966

70 MAY 14 1969  
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15-38700-6

15-38700-  
NOT RECORDED.  
2 MAY 8 1969

No. 1851 Misc.

FBI  
5-6-69

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

FRANK LISCIANDRELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS  
AND ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION  
TO THE GRANTING OF THE PETITION FOR A WRIT  
OF CERTIORARI

ERWIN N. GRISWOLD,  
Solicitor General,

Department of Justice,  
Washington, D. C. 20530.

1d  
No objections  
5/8/69

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1851 Misc.

FRANK LISCIANDRELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS  
AND ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION  
TO THE GRANTING OF THE PETITION FOR A WRIT  
OF CERTIORARI

In this collateral proceeding, petitioner challenges his 1962 conviction. Tried in the United States District Court for the Southern District of Illinois, petitioner and three others were found guilty of conspiracy to possess, and possession of liquor stolen from an interstate shipment in violation of 18 U.S.C. 659. On June 2, 1962, petitioner was sentenced to imprisonment for seven years and fined \$3,000. A divided panel of the court of appeals issued an opinion reversing the convictions (340 F. 2d 243), but, after rehearing en banc, the full court affirmed the convictions. 340 F. 2d 254. A timely petition for a writ of certiorari filed by petitioner's co-defendants was denied, 381 U.S. 911, and a later petition filed by petitioner raising the same issues was also denied. 390 U.S. 908.

1. As appears more fully in the opinion of the court of appeals en banc, 340 F. 2d at 256-257, and in the government's brief in opposition to the petition of the co-defendants (Nos. 924, 925, 926, O.T. 1964), the principal issue on direct appeal was whether statements made by various co-defendants after the arrest of co-defendant David Falzone, including statements that co-defendant Allegretti had arranged to have some one "squash the beef", were properly admitted in evidence against all defendants. The court held the admission proper since the evidence showed that the statements were made in furtherance of the conspiracy which had continued, and in which Falzone took an active part, after his arrest.

Another issue considered on appeal arose out of the cross-examination of government witness Covelli, a co-conspirator who had pleaded guilty. The defense asked him about a prior statement which gave a different date for the meeting where there was talk about Allegretti's ability to "squash the beef"; Covelli said that Falzone had corrected him during a 1960 meeting in the United States Attorney's office at which government counsel were present. On redirect examination, Covelli described how Falzone had corrected him and also stated that Falzone had said he would cooperate with the government but wanted to be named as a defendant. This evidence was limited to Falzone alone. Later in the trial, when the government placed an F.B.I. agent on the stand for other purposes, he was cross-examined as to the April 1960 meeting. The agent described Falzone's corrections and testified to the entire conversation among all those present, including what Falzone had been told the government had learned from Covelli. After Falzone testified

to his version of the 1960 meeting, the F.B.I. agent testified in rebuttal to further conversations with Falzone. All of his testimony was limited to Falzone.

2. In his motion under 28 U.S.C. 2255, petitioner levelled a general challenge to these rulings, relying on this Court's decision in Bruton v. United States, 391 U.S. 123. The district court denied the motion and both it and the court of appeals denied leave to appeal in forma pauperis. There is no basis for further review. First, the Bruton decision expressly denied an intention to abolish well-established exceptions to the hearsay rule such as the exception making statements by co-conspirators in furtherance of the conspiracy admissible against all members of the conspiracy. See 391 U.S. at 128 n. 3. Second, the testimony which was admitted against Falzone alone does not fall within the rationale of the Bruton ruling. As noted in the government's brief in opposition in Nos. 924 et seq., O.T. 1964, the defendants originated the inquiry into the 1960 meeting by their cross-examination of Covelli and thus opened the door to admission of the whole conversation. Moreover, the testimony added no material facts beyond the testimony given by Covelli on direct, but was designed to establish the credibility of Covelli after defendants had sought to impeach him by prior inconsistent statements. Finally, Falzone took the stand and was subject to cross-examination. Thus the evidence admitted against Falzone alone was neither powerfully incriminating as to petitioner nor was petitioner denied the right of confrontation. See Frazier v. Cupp, No. 643, O.T. 1968, decided April 22, 1969; Boone v.

United States, 401 F. 2d 659, 663 (C.A. 3), certiorari denied  
sub nom. Jackson v. United States, No. 1258 Misc., March  
24, 1969.

It is therefore respectfully submitted that the petition  
for a writ of certiorari should be denied..

ERWIN N. GRISWOLD,  
Solicitor General.

MAY 1969.

UNITED STATES GOVERNMENT

# Memorandum

TO : DIRECTOR, FBI

DATE: 6/4/69

FROM : SAC, WFO (15-New) (RUC)

SUBJECT: FRANK LISCIANDRELLO  
ET AL  
TFIS-CONSPIRACY  
(OO:SI)

Enclosed for the Bureau and Springfield Office is one copy of a handprinted petition for Writ of Certiorari filed in the United States Supreme Court (USSC) on 3/28/69, in the case of FRANK LISCIANDRELLO VS. THE UNITED STATES (# 1851 Miscellaneous).

The USSC denied certiorari in this case on 6/2/69.

Instant petition contains references to FBI Agents and alleges the District Court erred in permitting them to testify regarding statements made by a co-defendant, and that such testimony violated his right of cross-examination.

As this case has been disposed of in the Supreme Court, no further inquiry remains for WFO.

2 Bureau (Enc. 1)  
1- Springfield (Enc. 1)  
1- WFO

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ENCLOSURE

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In The  
United States Supreme Court

No. 1851 Misc.

October Term 1968

Frank Lisciandrello,

Petitioner

-Vs-

United States of America,

Respondent

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OFFICE OF THE CLERK  
SUPREME COURT, U.S.

RFC

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OFFICE OF  
SUPREME COURT, U.S.

Application For leave to Proceed

In Forma Pauperis

Petitioner FRANK Lisciandrello, respectfully requests  
leave to file the accompanying Petition For a Writ of  
Certiorari in Forma Pauperis.

15-38700-283

Petitioner's affidavit in support is attached hereto

Respectfully submitted

ENCLOSURE

Frank Lisciandrello  
Frank Lisciandrello

Affidavit in Forma Pauperis

State of Kansas

ss:

County of Leavenworth

Having appeared before me in person, and having been first duly sworn Frank Lisciandrello deposes and says:

That he is a citizen of the United States; that he is over the age of 21 years; that he is petitioner in the above entitle cause, That he feels he has a good and just cause of action against the named respondents; that he is an indigent person; that he is therefore unable to pay the costs of prosecuting the above action and requests to be permitted to proceed in Forma Pauperis. (28 U.S.C. 1915.)

Frank Lisciandrello  
FRANK LISCIANIRELLO

Subscribed and sworn

to before me this 26

day of March, 1969

Berry R. McBee  
Parole Officer

"Authorized by the Act of July 7, 1955  
to administer oaths (18 U.S.C. 4001)."

In The  
United States Supreme Court

No. Misc  
October Term 1968

Frank Liscia andrello,  
Petitioner

-Vs-  
United States of America,  
Respondent.

Petitioner Frank Liscia andrello prays that a writ of certiorari be issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-titled cause on January 28, 1969.

Opinion Below

No opinion has been rendered in the cause. Writ of certiorari is sought on an Order of the circuit court dated January 28, 1969, denying petitioner's motion to proceed

on appeal in forma pauperis.

### Jurisdiction

The order of the court of appeals was entered January 28, 1969. This Court has jurisdiction under Title 28, United States Code, Section 1254(1) and 2101(c).

### Questions Presented

Whether the Court below was in error in denying an indigent federal prisoner the right to appeal in forma pauperis where there is a constitutional right violated in the District Court?

### Statement of the Case

During the trial of the petitioner, the Court permitted a damaging statement, allegedly made by co-defendant Falzone, to be considered by the jury against all other defendants, when alleged statement was made after Falzone's arrest. This statement was admitted against petitioner over objections. The statement was substantial principle evidence tending to

support the verdict of guilty and has been relied upon by the government to sustain the conviction.

Max Olshon was permitted over specific objection, to testify to conversations with co-defendant Falzone concerning petitioner, without Frank Pisciamarello being present, or without his knowledge or permission (P. 154 R.T.)

Next Gerald Coyelli, a government witness was permitted over specific objections, to testify to events that happened outside the presence of petitioner and without his knowledge or permission.

Thereafter, John J. Oitzinges, a F.B.I. Agent appearing as a government witness was permitted, over specific objections to testify to conversations with co-defendant Falzone to events pertaining to petitioner, without petitioner being present or without his knowledge or permission (pp. 257-258, R.T. 1152 - 1154.)

### Reason For Granting the Writ

Petitioner FRANK hisciandrello, was convicted for violation of 18, U.S.C. 371, 659 on June 26, 1962 and is presently serving a seven year commitment. Petitioner filed a motion attacking this judgment and sentence, pursuant to 28 U.S.C. 2255 due to a violation of petitioner's constitutional rights occurring at his trial in the United States District Court for the Southern District of Illinois No. Civil Action 17-7999.

Petitioner and co-defendants were charge with violating Title 18, United States Code, Sections 371, 659. Petitioner was convicted and appealed to the United States Court of Appeals for the Seventh Circuit where his conviction was affirmed. United States v. hisciandrello, 340 F.2d 243 and 340 F.2d 254 (1964).

At trial, the court permitted David Falzone, Gerald Covelli, John J. Oitzinger, Max Oloron, to relate in excruciating detail to the jury the details of a conversation made by petitioner's co-defendant. The conversation related by the above named co-defendants and F.B.I. Agents unequivocally incriminated petitioner.

Following the testimony, the court instructed the jury to regard the extrajudicial statement of the co-defendants insofar as the concerned or implicated the petitioner.

It is now very clear that the extrajudicial confession and admissions of the petitioner's co-defendants incriminating the petitioner, violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. Bruton v. United States, 391 U.S. 123 (1968). In Bruton this Court expressly overruled Delli Paoli v. United States, 352 U.S. 232 (1957), in which the court had held that it was reasonably possible for a jury to follow sufficiently clear instruction to disregard a confessor's extrajudicial statement implicating a co-defendant in a crime. Thus in Bruton this Court stated:

"We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statement in determining petitioner's guilt, admission of evidence confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule Delli Paoli and reverse."

The court below contends that the instant case is "distinguishable" from the Bruton case and then says that Bruton and Roberts are not clear on the facts of those particular cases? If the government is in doubt as to the circumstances involved in Bruton, one wonders how the government can persuasively distinguish Bruton from the instant case.

As a matter of fact, in Bruton, the co-defendant Evans, did not take the stand and the violation in Bruton parallels the violation of Clarence's Sixth Amendment right of confrontation. In Bruton, this Court was acutely aware of the prejudicial nature of the co-defendant's extrajudicial confession. This Court observed:

Even greater xxx was the likelihood that the jury would believe Evans made the statement and that they were true xxx not just the self-incriminating portions, but those incriminating petitioner as well. Plainly, the introduction of Evans confession added substantial, perhaps even critical, weight to the government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner was thus denied his constitutional right of confrontation." (Emphasis supplied).

Petitioner wonders if page after page of detailed testimony from the lips of F.B.I. Agents and undicted co-defendant which vividly and in detail portray and explain the entire alleged crime in issue, be regarded as any thing less than error.

In Bruton, this Court was determined that:

"The government should not have the windfall of having the jury be influenced by evidence against the defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."

This Court also wisely observed quoting Mr Justice Jackson:

"The naive assumption that prejudicial effect can be overcome by instructions to the jury \*\*\* all practicing lawyers know to be unmitigated fiction \*\*\*"

Judge Barnes, speaking for the Ninth Circuit Court of Appeals observed not long ago that:

"It is a fundamental precept of the administration

of justice in the Federal Courts that the accused must not only be guilty of the offense of which he is charged and convicted but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. Accordingly it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with proper standards of law." Wilson v. United States, 350 F.2d 312, 314, 325 (1958).

This Court and most of the Circuit Courts have recognized and utilized this fundamental prescription. E.g.; Ballenback v. United States, 326 U.S. 607, 614-615 (1946); Fry v. United States, 304 F.2d 296, 298-299 (7th Cir 1962); Lindsey v. United States, 237 F.2d 893, 898 (9th Cir 1956).

The error of which petitioner complains is not "technical"; it was not caused by other evidence. Cordle v. Allied Chemical Corp., 309 F.2d 821, 825 (6th Cir 1962); On the contrary, it must be deemed highly prejudicial, "as it was calculated to

produce a substantial influence on the jury verdict." United States v. Wortman, 326 F.2d 717, 729 (3rd Cir. 1964). How can the government, or this Court, clearly evaluate "the impact of the thing done wrong on the minds of other men?" Kotteakos v. United States, 328 U.S. 750, 764 (1945).

"(T)he character of the proceeding "and" what is at stake upon its outcome xxx are material factors in judgment." Kotteakos v. United States, Supra, 328 at 726. In this criminal proceeding, the next several years of petitioner's life -- in short, his liberty -- are "at stake upon its outcome." With liberty hanging in the balance, neither the government nor this court can speculate upon the probable reconviction and decide according to how the speculation comes out. Kotteakos v. United States, Supra, 328 at 743. For after all, our system demands that a defendant be found guilty the right way." Wilson v. United States, Supra.

This case is not distinguishable from Barton in any meaningful way; the prejudice in this case was not cured by cautionary instructions and it is plainly apparent that the petitioner was not found guilty in the right way. He did not receive a fair trial. As this Court observed in Roberts

v. Russel, 392 U.S. 293 (1968)

"xxx despite the cautionary instruction, the admission of a defendant's confession which implicates a co-defendant results in such a "serious flaw" the retroactivity of the holding in Bruton is therefore required; the error went to the basis of a fair hearing and trial because the procedural apparatus never assured [the petitioner] a fair determination of his guilt or innocence." (Emphasis supplied).

Petitioner has been incarcerated since August 6, 1964, a period of more than four years. His trial was infected with some measure of prejudice from irrelevant but inflammatory news stories, by the improper reference of a government witness to petitioner's past criminal conduct. United States v. Giamandrell, 340 F.2d 243 and 340 F.2d 254 (1964), and by the powerfully incriminating extrajudicial statement of petitioner's co-defendant. To repeat, petitioner did not receive a fair trial.

Conclusion

For the above stated reasons petitioner respectfully urges this Honorable Court to grant his petition for writ of certiorari.

Respectfully submitted

*Frank Liscianello*  
FRANK LISCIANELLO

Certificate of Service

I hereby certify that I had mailed this 26 day of March, 1969, a true and correct copy of the attached Writ of Certiorari to the Solicitor General of the United States at his regular place of business in Washington, D. C.

*Frank Liscianello*  
FRANK LISCIANELLO

Subscribed and sworn to

before me this 26 day of

March, 1969

*Berry R. Moore*  
Parole Officer

"Authorized by the Act of July 7, 1955,  
to administer oaths (18 U.S.C. 4001)."

Appendix

Appendix

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 28, 1969

Before

Hon. Latham Castle, Chief Judge

Hon. John S. Hastings, Circuit Judge

Hon. Roger J. Killey, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

Hon. Walter J. Cummings, Circuit Judge

Hon. Otto Kerner, Circuit Judge

Frank Liscianrello

Petitioner

Misc. No. 656 vs.

United States of America,

Respondent.

From the United States

District Court for the

Southern District of

Illinois, Northern

Division

On consideration of the request of the petitioner, Frank Liscianrello, for reconsideration of the order entered herein December 6, 1968, denying leave to appeal in forma pauperis, said request being treated as a motion for reconsideration of said order:

It Is Ordered that the motion for reconsideration of the order entered December 5, 1968, denying leave to appeal in forma pauperis, is denied.

United States Court of Appeals

For the Seventh Circuit  
Chicago, Illinois 60604

DECEMBER 5, 1968

Before

LATHAM CASTLE, Chief Judge

Hon. \_\_\_\_\_

Hon. \_\_\_\_\_

Hon. \_\_\_\_\_

FRANK LISCIANDRELLO,  
Petitioner,

MISC. RECORD

No. 656

UNITED STATES OF AMERICA,  
Respondent

From the United States  
District Court for the  
Southern District of  
Illinois, Northern  
Division

This matter comes before the Court on the motion of Frank Liscandrello for leave to proceed in forma pauperis. The court has before it the files from the United States District Court for the Southern District of Illinois, Northern Division, and on consideration of all the documents before it,

IT IS ORDERED that the said motion of Frank Liscandrello for leave to appeal in forma pauperis from an order entered by the said United States District Court in Civil Action No. 65-2999 be, and the same is hereby denied.

**United States Court of Appeals**

For the Seventh Circuit  
Chicago, Illinois 60604

January 28 19 69

Before

Hon. LATHAM CASTLE, Chief Judge  
Hon. JOHN S. HASTINGS, Circuit Judge  
Hon. ROGER J. KILEY, Circuit Judge  
Hon. LUTHER M. SWYGERT, Circuit Judge  
Hon. THOMAS E. FAIRCHILD, Circuit Judge  
Hon. WALTER J. CUMMINGS, Circuit Judge  
Hon. OTTO KERNER, Circuit Judge.

FRANK LISCIANDRELLO,  
Petitioner,

Misc. No. 656

vs.

UNITED STATES OF AMERICA,  
Respondent.

} From the United States  
District Court for the  
Southern District of  
Illinois, Northern  
Division

On consideration of the request of the petitioner, Frank Lisciandrello, for reconsideration of the order entered herein December 6, 1968, denying leave to appeal in forma pauperis, said request being treated as a motion for reconsideration of said order:

IT IS ORDERED that the motion for reconsideration of the order entered December 5, 1968, denying leave to appeal in forma pauperis, is denied.

FEDERAL BUREAU OF INVESTIGATION  
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No Duplication Fees are charged for Deleted Page Information Sheet(s).

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